2007

Paul Houghton, Billie Henderson, Damian Henderson, Wayne Rubens, Ron Roes and Susan Roes v. Department of Health, The Office of Recovery Services, The Department of Human Services and The State of Utah and Rod L. Betit, Emma Chacone, John Does 1-50 and Janes Does 1-50 : Brief of Appellant

Utah Court of Appeals

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL HOUGHTON, BILLIE HENDERSON, individually and each as representative of a class, DAMIAN HENDERSON, WAYNE RUBENS, RON ROES AND SUSAN ROES, who are other members of these classes, similarly situated, Plaintiffs and Appellants, v. **DEPARTMENT OF HEALTH**, THE OFFICE OF RECOVERY SERVICES, THE DEPARTMENT OF HUMAN SERVICES and THE STATE OF UTAH (the "State Defendants") and ROD L. BETIT, Director of the Department of Health and Director of Department of Human Services; EMMA CHACONE, Executive Director of the Office of Recovery Services; JOHN DOES 1 - 50 and JANE DOES 1 - 50 (the "individual defendants"), Defendants and Appellees,	Supreme Court No. 20070197-SC Third District Ct. No. 950907491

BRIEF OF APPELLANTS

Interlocutory Appeal to the Utah Supreme Court from the Decision of Third Judicial District Court of Salt Lake County, Judge Anthony B. Quinn

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES & STANDARD OF REVIEW

The Recipients/Appellants have intentionally limited the scope of this Brief to the issues that they believe this Court intended to hear, based on the Court's May 30, 2007 Order.[1] The Order granted this interlocutory appeal and stated two issues:

> 1. Whether this Court has jurisdiction, pursuant to rule 5 of the Rules of Appellate Procedure, to review the December 22, 2006 "order on motion for decertification", in light of the district court's subsequent minute entry, dated January12, 2007, designating the December 22 order "provisional", and its February 15, 2007 order designating the December 22 order as "final" without making any modifications to it.
>
> 2. If so, whether the district court's December 22, 2006 decision and order decertifying the class was erroneous.

R. 4318-4321, Supreme Court's Order of May 30, 2007, Addendum 5. Recipients accept statement two as a limitation of scope and a denial by the Court of the

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[1] Initially, Recipients requested that this Court "entertain in this interlocutory appeal [nine] other interlocutory orders where the resolution of these matters will have a 'meaningful effect' on the parties and result in a more speedy and certain resolution of this litigation which is now in its 13th year." Plaintiffs' Petition for Permission to Appeal Interlocutory Order, March 7, 2007 (not included in the official Record).

request to entertain the other motions noted in the Petition, and will limit their response unless notified by the Court to the contrary.

The appropriate standard of appellate review is "correctness," since both issues are questions of law (legal interpretation of a rule of appellate procedure and a case holding). This Court gives no deference to trial court rulings interpreting statutes and cases. *St. Benedict's Dev. Co. v. St. Benedict's Hospital*, 811 P.2d 194, 196 (Utah 1991).

Related Questions. Recipients believe that there are two additional legal issues that track exactly with the scope of this appeal as set forth in the 5/30/07 Order. These additional issues are:

1. What are the appropriate **class criteria**, given the ruling in *Houghton III*?

2. Should the Plaintiffs have **full discovery** on remand?

In a nutshell, we believe this Court has already determined the answer to the first question in *Houghton III,* and need only restate it on remand as the qualifying class criteria. This would greatly assist the fair and speedy resolution of this case.

As to discovery, the limited discovery allowed below has severely hampered and obstructed the resolution of this matter. This Court has twice previously instructed the trial court to grant full discovery, but the trial court did not follow that admonition. On remand, there should be an unmistakable order

granting *full discovery* so that all pertinent matters may be presented for resolution. This will also greatly speed the case along.

If we have overstepped our bounds in asking for consideration of these two closely related matters, we apologize in advance. The arguments thereon will be very brief, and we believe the Court will agree that they should be considered as part of this interlocutory appeal.

CONTROLLING STATUTORY PROVISIONS

Two sections of the Medical Benefits Recovery Act ("Act") are controlling, at least in part (with the relevant language highlighted):

A. Recovery of Lien by the State [1998]

26-19-5. Recovery of medical assistance from third party -- Lien -- Notice -- Action -- Compromise or waiver -- Recipient's right to action protected. [1998]

(1) (a) When the department provides or becomes obligated to provide medical assistance to a recipient because of an injury, disease, or disability that a third party is obligated to pay for, the department may recover the medical assistance directly from that third party.

(b) The department's claim to recover medical assistance provided as a result of the injury, disease, or disability is a lien against any proceeds payable to or on behalf of the recipient by that third party. ***This lien has priority over all other claims to the proceeds, except claims for attorney fees and costs authorized under Subsection 26-19-7(4).***

(2) The department shall mail or deliver written notice of its lien to the third party at its principal place of business or last known address. The notice shall include a recipient name, the approximate date of injury, a general description of the type of injury and, if applicable, the general location where the injury is alleged to have occurred.

(3) The department may commence an action on its lien in its own name, but that lien is not enforceable as to a third party unless:

> (a) the third party receives written notice of the department's lien before it settles with the recipient; or
>
> (b) the department has evidence that the third party had knowledge that the department provided or was obligated to provide medical assistance.

(4) The department may waive a claim against a third party in whole or in part, or may compromise, settle, or release a claim or lien.

(5) An action commenced under this section does not bar an action by a recipient or a dependent of a recipient for loss or damage not included in the department's action.

(6) The department's lien on proceeds under this section is not affected by the transfer of the proceeds to a trust, account, or other financial instrument.

(Emphasis added.)

B. Recovery by Recipient - Attorney's Fees

26-19-7. Action or claim by recipient -- Consent of department required -- Department's right to intervene -- Department's interests protected -- Attorney's fees and costs. [1995]

(1) (a) A recipient may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance, without the department's written consent.

(b) The department has an unconditional right to intervene in an action commenced by a recipient for recovery of medical costs connected with the same injury, disease, or disability, for which it has provided or has become obligated to provide medical assistance.

(2) (a) If the recipient proceeds without the department's written consent as required by Subsection (1)(a), the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action.

(b) The department may recover in full from the recipient or any party to which the proceeds were made payable all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

(3) The department's written consent, if given, shall state under what terms the interests of the department may be represented in an action commenced by the recipient.

(4) The department may not pay more than 33% of its total recovery for attorney fees, but shall pay a proportionate share of the costs in an action that is commenced with the department's written consent.

(Emphasis added.)

CONTROLLING CASE LAW

1. *Houghton v. Dept. of Health*, 2005 UT 63, 125 P.3d 860 ("*Houghton III*").

2. *State v. McCoy*, 2000 UT 39, 999 P.2d 572 ("*McCoy*").

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

Certification on Attorney Fees Issue. This action was filed on October 27, 1995, and Class II plaintiffs (recipients with attorneys) were certified as a class by stipulation on January 29, 1996. R. 1, 98 and 100. In *Houghton III,* the State challenged the certification on the grounds that the attorney fees claim was insufficiently noticed. This Court rejected that claim noting "[w]e therefore conclude that plaintiffs' notice of claim was sufficient to communicate the nature of the [attorney fees] claim they now assert." *Houghton v. Dept. of Health,* 2005 UT 63, 125 P.3d 860, ¶ 23 ("*Houghton III*") (parenthetical added).

Three Prior Appeals. In the first appeal, this Court reversed disqualification of Plaintiffs' counsel. *Houghton v. Dept. of Health*, 962 P.2d 58 (Utah 1998). In the second appeal, this Court unanimously reversed the trial court's dismissal of the Class II Plaintiffs' attorney fee claims. *See Houghton v. Department of Health,* 2002 UT 101, 57 P.3d 1067, ¶¶ 10, 11 ("*Houghton II*"). On the third appeal, this Court unanimously held that the trial court misinterpreted **both** the statute and this Court's ruling in *State v. McCoy,* 2000 UT 39, 999 P.2d 572. The State's obligation to pay a proportionate attorney's fee was not dependent on "whether the recipient expressly excluded the State's claim," but on whether consent had been requested. "In all cases" where consent was requested, the State owed "its proportionate share of attorney's fees." *Houghton III,* ¶¶ 48, 49.

The Court also reversed the trial court's failure to grant discovery and criticized its unduly narrow interpretation of *McCoy*. *See Houghton III*, ¶¶ 49-51.

STATEMENT OF FACTS

The following facts are relevant to the consideration of this interlocutory appeal:

Limited Discovery and Early Focus on Decertification

1. Decertification Was the Focus on Remand. The Utah Supreme Court ordered full discovery on remand. *Houghton III*, ¶¶ 38. However, in the very first hearing after remand the trial court noted ***"on the basis of the record before me, [I see] no common issue that would justify the case continuing as a class action"***. R. 4337 (Transcript of 1/13/06 Hearing, emphasis added). With that encouragement, Defendants filed another motion to decertify on February 17, 2006. R. 2087. Class decertification was confirmed as a "final order" on February 15, 2007, 11 years after the class was first certified. R. 4291.

2. Fourth Appeal. This fourth appeal deals with the trial court's failure to follow the *Houghton III* ruling defining class criteria which specifically recognized that Medicaid recipients are entitled to have the State pay a "proportionate share" of the recipient's attorney fees for recovering the State's lien, with consent. *Houghton III*, ¶¶ 39, 49. Other related motions important to the class were also denied. R. 4291.

3. **Limited Discovery in Eleventh Year of Litigation.** Due to persistent resistance by the State, no discovery was had until 2006. R. 106, 608 and 802. Judge Quinn's 2003 ruling limiting the scope of discovery was appealed and this Court held that the "district court adopted an erroneously narrow view of our holding in *McCoy*." *Houghton III,* ¶ 50. This Court reversed and remanded with "instructions to modify the scope of the discovery order consistent with this opinion." *Id.* The trial court ignored this instruction and allowed only narrow discovery focused on whether the class should be decertified. Fact 1 above; R. 4337; R. 2047, Order Re: Production of Documents, Confidentiality, and Briefing of Class Certification of Issues.

Failure to Follow *Houghton III*

4. **Trial Court Adopts Wholly New Standard.** The trial court's recent Order of 12/22/06 inexplicably ignores *Houghton III's* requirement that the State is required to "pay a proportionate share of the plaintiff's attorney fees," and instead adopts a wholly new "reasonable fee" standard determined by the "totality of the circumstances." Compare *Houghton III,* ¶¶ 39, 49 with the 12/22/06 Provisional Decertification Order, pps. 27, 20. R. 1895, 4194.

5. **New Standard is Basis of Decertification.** Because what is "reasonable" varies under the "totality of the circumstances," the trial court

reasoned that numerous individual issues predominate, justifying decertification due to lack of "predominance." 12/22/06 Provisional Order, pps. 29, 38, 42-44.

6. Trial Court Criticizes Supreme Court. The trial court frankly criticized the Supreme Court's Opinion in *Houghton III* as "not completely consistent" and "unexplained," among other criticisms. 12/22/06 Provisional Order, pps. 28-9, R. 4194.

Discovery and Spoliation of Evidence

7. About 2,786 Potential Plaintiffs. Plaintiffs deposed Brent Perry, Director of the Bureau of Medical Collections of ORS, who stated that the State's "database" could be queried as to third-party liability ("TPL") cases. R. 3527, Brent Perry Depo., p. 116:7-11. The query produced an 80-page document with 2,786 entries. *See* R. 3529-3610. This document purports to list all TPL recoveries in tort cases resulting in lien reimbursement where the recipient apparently had an attorney.[2] There are other codes on the document, and other information may be able to be produced. Since discovery was limited, it is unclear whether this includes all potential class members.

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[2] The first page of R. 3529 states that this is "Defendants' Fourth Production of Documents" and that the query includes "personal injury case files from November 1, 1994, to present." It then provides information "that includes attorney involvement, ORS reimbursement, case name, case number, open/close dates and whether a collection agreement was sent." *See* R. 3529.

8. **Preliminary Data on 412 Cases Examined.** Analysis of the data from the computer narratives of the 412 "cases," and the smattering of hard files that remain, shows:

412 – Files examined
421 – Actual number of claims filed in the 412 cases
286 – Cases where: 1) lien reimbursement amount, 2) consent received or requested and 3) amount of attorney fee payment can all be determined (67%*)
254 – Consent Requested (i.e., it can be determined) (89%†)
27 – 33% (or proportionate) fee allowed (consent agreement present) (11% of 254 cases‡)
19 – 30% fee allowed (consent agreement present) (8%‡)
1 – 28% fee allowed (consent agreement present) (<1%‡)
2 – 27% fee allowed (consent agreement present) (<1%‡)
1 – 26% fee allowed (consent agreement present) (<1%‡)
58 – 25% fee allowed (consent agreement present) (23%‡)
1 – 24% fee allowed (consent agreement present) (<1%‡)
3 – 21% fee allowed (consent agreement present) (1%‡)
93 – 20% fee allowed (consent agreement present) (37%‡)
11 – 1%-19% fee allowed (consent agreement present) (4%‡)
38 – No fee paid (consent requested or agreement present) (15%‡)[3]

R. 4165.

9. **Significance of Discovery Thus Far.** It is clear from the information provided that, due to spoliation and inadequate discovery, only 286 of the 421 claims (67%) had information sufficient to determine class criteria. Assuming the same percentages hold for all 2,786 cases as exist for the 421cases, 33% of those or 919 cases lack sufficient information to determine *McCoy/Houghton*

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[3] **Legend:** * Percentage of 421, † Percentage of 286, ‡ Percentage of 254.

III class criteria.[4] Therefore, if the ubiquitous 33% attorneys fee were present in essentially all of the projected 2,786 cases, about 2,500 (89%) recipients who secured lien reimbursement for the State were paid less than a proportionate fee. This group constitutes the putative class.

10. Spoliation of Evidence is Admitted. Massive spoliation occurred in this case in that virtually **all** the hard case files prior to 2001 were destroyed, during the litigation. The computer narratives that remain are often woefully incomplete. O.R.S. boss Brent Perry testified regarding this destruction:

> Q. All right. And do you know if paper files have been destroyed during that time, despite the fact that there's litigation going?
>
> ***A. I can tell you that we have files [back] to 2001. Prior to that the paper files were destroyed.***
>
> ***Q. Even despite the fact that there was litigation?***
>
> ***A. I guess, yes.***

R. 3520–3521, Perry Depo. 60:7-61:3 (emphasis, double emphasis and parenthetical added). Thus, despite awareness of the *Houghton* litigation, files were destroyed yearly, resulting in the loss of about 7-9 crucial years. The 1991-2000

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[4]Of the 286 claims reviewed, 254 had specific requests for consent as well as information regarding the percentage fee paid. Of those 254, an attorney fee of less than 33% was paid in about 89% of the total cases. This means about 2,480 recipients of the 2,786 potential class members were most likely paid less than the required proportional fee. In approximately 15% of the cases, no fee was paid even though there was a consent agreement. In about74% of the cases, the fee paid was 30% or less. *See* Fact 8 above.

files represent the critical pre-*McCoy* years before there was a policy change in about 2001, and a statute change in 2005. *See* Fact 24.

11. Fruit of Spoliation: Difficulty in Determining Consent. Due to spoliation, it is nearly impossible to determine from the remaining records whether consent was given, whether it was requested and denied, and the reasons for the alleged denial. This is verified by the State's own description of cases in its Decertification Memorandum II, 9/1/06, pps. 7-10, R. 2813-2816.[5] Mr. Perry testified it would be very difficult to determine whether a lien was reduced in order to pay attorney fees. R. 3527, Perry Depo. 114:19-115:8. This prejudices approximately one-third to 40% of the total cases, since much information cannot be determined from computer narratives alone. *See* samples, R. 3612-3632.

Payment, Accounting and Value of Claims.

12. No Attorney Fee Paid on Cases Under $1,000. The State's policy was to pay **no attorney fees** if the recovery was under $1,000. *See* R. 3631

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[5] These State-cited cases (R. 2813-2816) contain a description of "28 case files" where the State admits that "the recipient's request for consent was denied" and there was no contribution made for the recipient's attorney fees. *Id.* at p. 7. Of the 28 cases listed on these pages, 12 of them note that it is "***unclear from the notes*** why consent was denied." *Id.* (Items 2, 4, 5, 6, 8, 11, 13, 14, 16, 18, 23 and 24) (emphasis added). In another 13 cases, the phrase "consent was ***apparently*** denied" appears 13 times. *Id.* (Items 1, 3, 7, 9, 10, 12, 15, 17, 19, 20, 21, 22 and 25) (emphasis added). Thus, due to lack of information in the "narratives," it is either "unclear" or questionable about why consent was denied in 25 of 28 cases cited by the defense. We cannot go back to the hard case files to investigate because they have been destroyed.

("It is our ORS policy to offer a collection agreement to the attorneys when the Medicaid lien goes over $1,000"). There are approximately 1,300 such cases valued at somewhere in the neighborhood of $430,000.

13. No Consent Offered on IHC/Other Collection Cases. The State had a policy for some time of not offering consent on any cases where it had an agreement with IHC or other HMOs to collect medical expenses for the HMO. *See* R. 3811-3849, Case Nos. C000265067 and C000269953.

14. No Attorney Fees Paid. The number of cases where an attorney fee was not paid appears to number approximately 100 cases during the period 1994-2001. *See* examples in R. 3633-3642, Case No. C000156273, p. 3; and Case No. C000156239, p. 5.

15. Approximate Dollar Value of Class Claims. The State's summary purportedly shows TPL collections from approximately 1994 to 2006. R. 3529-3610. During this 12-year period, the State collected approximately $18,000,000 in Medicaid reimbursement from recipients who brought third party claims. Based on our preliminary evaluation without full discovery, the State paid an average of 22% for attorney fees (Fact 8 above) when it was required to pay a proportionate amount, usually 33%. Accordingly, Plaintiffs estimate that a 33% attorney fee, or $6,000,000, was owed, and that the State paid only about 2/3 of that, or $4,000,000, and that $2,000,000 is still owing.

16. Recipients Typically Pay at Least a One-Third Attorney Fee on TPL Claims. In virtually all cases, the typical Medicaid recipient with a TPL claim pays his or her attorney a minimum contingent fee of *one-third on the gross recovery* (and many pay 40% on difficult cases).[6] *See* R. 3778-3782, Affidavit of Colin King, Esq., and R. 3784-3788, Affidavit of Steven Sullivan, Esq.

Interlocutory Appeal Was Timely

17. January 12th Minute Entry Not "Advisory" Due to 3 Days for Mailing. The trial court's provisional "Order on Motion for Decertification" was filed by the court on Friday, December 22, 2006, and was *mailed* on the same day. R. 4194. Ignoring for a moment the trial court's own designation of the 12/22/06 Order as "provisional," the time for filing an interlocutory appeal of the December 22nd Order would be twenty days, plus three days mailing under Rule 22(d), Utah R. App. P.[7] Under a correct computation, the deadline was Tuesday,

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[6] As a matter of course, with a rare exception for special circumstances, the recipient always pays his/her attorney the percentage fee agreed on the *gross amount* of the recovery, and not on the net. Recipients typically pay all liens, including medicaid liens, out of their share of the recovery. Costs and liens are seldom deducted from the gross recovery before the attorney fee is determined. R. 3778-82, 3784-88.

[7] Twenty days from the December 22nd order would be January 11th. With the additional three days for mailing, the deadline falls on Sunday, January 14th. The 15th was a federal holiday. Thus the actual deadline is Tuesday, January 16th. This computation of time arrives at the same result whether the 3 mailing days are calculated at the *beginning* or *end* of the 20 day period.

January 16, 2007, meaning the court's January 12, 2007 Minute Entry designating the December 22nd Order as "not final ... provisional" could not be "advisory" under the State's theory. R. 4254.

18. Supplemental Briefs Related to Decertification. The 12/22/06 Provisional Decertification Order observes that the decision "to decertify the class potentially impacts at least some of the various pending motions from the parties." For that reason, the court ordered the parties to "submit supplemental briefs by January 12, 2007 addressing any impact of today's ruling on the various outstanding motions." Then,

> ***Once the parties have filed the supplemental briefs,*** this Court will schedule a hearing to hear arguments on all remaining outstanding motions.

R. 4194-4248, p. 54 (emphasis added).

19. January 9, 2007 Inquiry by Counsel. Because the trial court solicited additional briefs for filing after the interlocutory appeal cut-off date, Plaintiffs' counsel faxed Judge Quinn the 1/9/07 letter. R. 4249. Counsel therein pointed out possible problems because the briefs were due after "the time for appealing the decertification [order] will have undoubtedly passed." R. 4249.[8]

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[8] Counsel suggested that the court make it clear that Order was not "not a final Order until such time as you have ruled on these other matters." R. 4249. The letter then concluded with the statement that "It is an unusual situation and I am not quite sure exactly how to proceed, ***but I do need to protect the right to appeal, as you can well imagine."*** R. 4250 (emphasis added).

20. December 22nd Order Clarified as "Provisional." Judge Quinn's 1/12/07 responsive Minute Entry clarified that "the Court's Order of December 22, 2006 is ***not intended as a final order,***" but ***"should be considered provisional"*** until the additional motions were heard on January 23, 2007. R. 4254 (emphasis added).

21. The Trial Court Adopts 12/22/06 Order Anew in 01/23/07 Hearing. The additional motions were heard in oral argument on January 23, 2007. R. 4273. The court then adopted the 12/22/06 Provisional Order anew, as this colloquy reveals:

> MR. SYKES: Are you going to then issue just a revision of your prior order [of 12/22/06] incorporating everything?
>
> THE COURT: Let's have Mr. Lott prepare the order on today's [1/23/07] hearing denying those motions on the basis that I've stated ***and stating that the Court adopts the order dated 12/22 as its order for the issues addressed therein.***

Official Transcript 01/23/07 Hearing, p. 62:8-14,20-24, R. 4337 (emphasis and parenthetical added).

22. Interlocutory Appeal Anticipated by All. The court and all counsel anticipated the interlocutory appeal from the reincorporated 12/22/06 Provisional Order, and discussed this at the 01/23/07 hearing. R. 4437-8 (Transcript, p. 63:1-7). The Court requested that Plaintiffs' counsel file a motion for a stay "once you know whether or not the Supreme Court has accepted your interlocutory appeal." R.4337 (Transcript of 1/23/07 hearing, pps. 63-4).

23. Revised Order of 02/15/07 Makes 12/22/06 Order Final. The trial court issued its revised Order on February 15, 2007. R. 4291-4295, Addendum 4 herein. That 2/15/07 Order reflects, *inter alia,* under a subtitle "Impact of December 22, 2006 Order," that the court's Order of that date "necessarily impacts Plaintiffs' remaining motions as addressed herein." It proceeds to discuss those motions and the court's ruling thereon. The Order then contains a bold heading which states "The December 22, 2006 Order on Motion for Decertification Is Now a Final Order." The Order finally recites:

> The Court's January 12, 2007 Minute Entry provided that ***the December 22, 2006 Order was not intended to be a final order until after consideration of the additional motions addressed herein.*** ... There will be no modifications to the December 22, 2006 Order on Motion for Decertification. ... ***With the signing of this Order, the December 22, 2006 Order is now a final order.***

R. 4291-4295, p. 3 (emphasis and double emphasis added). Accordingly, "the December 22, 2006 Order on Motion for Decertification" was ***"now a final order"*** on 2/15/07.

Legislature Adopted "Proportionate" Standard

24. Legislative Change Adopts 33.3% Fee. During almost all of this litigation, until the year 2005, the statute in effect was exactly as quoted herein. Utah Code Ann. § 26-19-7(4). In 2005, the Legislature amended the statute to confirm the State's obligation to pay an attorney's fee of 33.3% "of the

department's total recovery," as well as "a proportionate share of the litigation expenses directly related to the action." Utah Code Ann. §26-19-7(2)(c)(ii) (2005).

SUMMARY OF ARGUMENT

A.

Recipients' petition for interlocutory appeal was timely filed because the trial court designated the December 22, 2006 decertification order as "provisional" and "not final" until the January 23, 2007 hearing. The order arising from the January 23, 2007 hearing was signed on February 15, 2007, and a timely petition for interlocutory appeal was filed on March 7, 2007.

B.

The class decertification order was erroneous because it failed to apply this Court's *Houghton III* standard requiring the State to pay a proportionate share of attorney fees as long as the recipient or his attorney requested consent.

C.

This Court should rule unequivocally that the class-qualifying criteria, based on the language in *Houghton III*, are 1) a state lien reimbursement, 2) obtained by recipient's attorney, and 3) with state consent or request for consent.

D.

This Court should order full discovery. Full discovery would assist in moving the case forward to rapid resolution because relevant information

necessary to determining class membership has been extremely difficult or impossible to get, given the limited discovery allowed by the trial court.

ARGUMENT

POINT I

~ Interlocutory Appeal Was Timely Filed ~

PLAINTIFFS' PETITION FOR INTERLOCUTORY APPEAL WAS TIMELY FILED BECAUSE THE TRIAL COURT DESIGNATED THE DECEMBER 22, 2006 DECERTIFICATION ORDER AS "PROVISIONAL" AND "NOT FINAL" UNTIL THE JANUARY 23, 2007 HEARING. THE ORDER ARISING FROM THE JANUARY 23, 2007 HEARING WAS SIGNED ON FEBRUARY 15, 2007, AND A TIMELY PETITION FOR INTERLOCUTORY APPEAL WAS FILED ON MARCH 7, 2007.

The State argues in its Opposition to the Interlocutory Appeal Petition that Plaintiffs' Petition was not timely filed, depriving the Supreme Court of jurisdiction to hear this matter. *See* State's Answer in Opposition, 04/12/07.[9] The State's main argument is that the 1/12/07 Minute Entry must be considered an "advisory opinion" because it was entered one day after January 11th, alleged by the State to be the 20th day after 12/22/06. This reflects simple miscalculation by the State, as its arguments ignore some of the rules for computing deadlines.

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[9] We are generally employing numeric dates because they seem to aid in clarity when so many dates are discussed in a short space.

A. A Trial Court May Revise Its Orders at Any Time.

Rule 54(b), Utah R. Civ. P. provides that "any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights . . . is ***subject to revision at any time before the entry of judgment adjudicating all the claims*** and the rights and liabilities of all the parties." Here, the 12/22/06 Provisional Order adjudicated "fewer than all the claims" for "fewer than all the parties," and there had never been an entry of an order complying with the first sentence in Rule 54(b), i.e., directing final judgment, until the 2/15/07 Final Order. By the 12/22/06 Provisional Order's original language, not "all the claims" of the parties were decided, so the court solicited "supplemental briefs." *See* Fact 18.

The trial court clearly recognized that other pending motions would be affected, and therefore invited "the supplemental briefs" on those issues. Fact 18. "The December 22nd Order should be considered provisional" until such time as additional motions were heard on 1/23/07. Facts 17, 20; R. 4254. It was well within the trial court's Rule 54(b) prerogative to allow this "revision," and it means that the first day for appeal of the interlocutory order arose on 2/15/07, and the 20th day would be March 7, 2007. With three days for mailing, the deadline to file the interlocutory appeal on this case would be March 10, 2007. The Petition herein was filed March 7, 2007, making it timely under either scenario.

B. Not Significant That the Trial Court Allegedly Made No Changes to the "Provisional" 12/22/06 Order.

The Supreme Court's Order granting the interlocutory appeal poses the jurisdictional question of whether it has the right to review the 12/22/06 Provisional Order "in light of the district court's subsequent minute entry, dated January 12, 2007, designating the December 22 order 'provisional', and its February 15, 2007 order designating the December 22 order as 'final' without making any modifications to it." *See* Supreme Court Order, 05/30/07, R. 4318. Appellants argue that the 2/15/07 Order *did modify* the 12/22/06 Provisional Order by stating "the December 22, 2006 Order on Motion for Decertification ***is now a Final Order.***" Fact 23, R. 4291, p. 3 (emphasis added). Prior to that, the 12/22/06 Order was simply "provisional," so "[w]ith the signing of this [2/15/07] Order, the December 22, 2006 Order is now a final Order." *Id.* (parenthetical added). Then "provisional," now "final": that is a modification.

Even if the 12/22/06 Order was not "modified" in some technical sense, that should not make any difference here. The trial court, in a timely manner, designated the 12/22/06 Order as "provisional" until the hearing of other motions. Plaintiffs' counsel reasonably relied upon that statement by the court as postponing the time to appeal. Equity requires that the "provisional" designation be respected.

C. No "Advisory Opinion."[10]

The 1/12/07 Minute Entry cannot be considered "an advisory opinion." The State miscalculated the time under Rule 22(d), Utah R. App. P. *See* Fact 17.

D. Intent That 12/22/06 Order Was "Provisional."

The trial court itself said that "the December 22nd Order should be considered provisional" until the other motions were heard and decided on 1/23/07. R. 4249, 4254. The colloquy at the 1/23/07 hearing clarified the intent to preserve the interlocutory appeal right. Fact 21. Accordingly, the trial court agreed that the December 22nd Order was "provisional" and "not ... final" until the other related matters could be briefed and heard on January 23rd. Fact 17.

Plaintiffs relied in good faith on the trial court's and defense counsel's assurance that the December 22nd Order was "provisional" and "not ... final" for purposes of their interlocutory appeal. It would be grossly unfair to now hold that this interlocutory appeal was somehow untimely filed, when counsel in good faith relied on defense counsel, who prepared the order, and the trial court to clarify the

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[10] This "Advisory Opinion" argument by the State is irrelevant if a trial court has its own interlocutory authority to change its rulings under Rule 54(b). Nevertheless, because the issue has been raised by the Defense, a response is made herein to that argument.

intent to preserve the interlocutory appeal right. The State should be equitably and judicially estopped from making a contrary argument.

The 1/23/07 hearing resulted in an Order being entered on 2/15/07. R. 4291. A timely interlocutory appeal was taken from that final, interlocutory order, which incorporated the December 22nd Order. *See* Plaintiffs' Petition, 3/07/07.

E. Interlocutory Appeal Should be Granted Now Based on Principles of Equity and Judicial Economy.

The Decertification Order guts the Plaintiffs' class action, which is the main issue. To proceed to trial at the district court level on the claims of the four named Plaintiffs would be pointless. These four individual cases would be judged on the basis of an erroneous legal standard, i.e. "totality of the circumstances." There is absolutely nothing to be gained by that, and it would simply cause more delay in a very old case. All of the truly important issues in the larger case lie with the class, not the named class representatives.

This case has now been appealed four times to the Utah Supreme Court. It surely is one of the oldest cases on the Court's docket. In order to be fair to the parties, and in an effort to get this case finally resolved, it is equitable and sensible to allow this matter to be appealed, especially in light of the fact that Plaintiffs' counsel did everything possible to preserve the right to appeal.

What more could anyone expect of Plaintiffs, when the trial court solicited "supplemental briefs" in the final paragraph of the 12/22/06 Provisional Order? Fact 18. Seeking clarification from the court by the 1/9/07 letter (Fact 19) was reasonable and appropriate. Should Plaintiffs have insulted the trial court and said "no, we don't believe you and cannot rely on your orders and therefore we are going to appeal anyway"? Parties should not have to practice law in such an extreme and outrageous way in order to protect the timing of a right to appeal. Counsel should be able in good faith to rely on defense counsel's good faith in preparing the Order (R. 4291), as well as the trial court's designation of the 12/22/06 Order as "provisional." It is fair that this Court hear this Interlocutory Appeal now.

Therefore, based on the principles of equity and judicial economy, this Court should allow the interlocutory appeal to go forward and hear the issue regarding the decertification of the class at this time.

POINT II

~ Decertification Was Erroneous Under *Houghton III* Standard ~

THE CLASS DECERTIFICATION ORDER WAS ERRONEOUS BECAUSE IT FAILED TO APPLY THIS COURT'S *HOUGHTON III* STANDARD REQUIRING THE STATE TO PAY "ITS PROPORTIONATE SHARE OF ATTORNEY FEES IF THE RECIPIENT OR HIS ATTORNEY REQUESTED CONSENT FROM THE STATE."

A. Summary of Problems with Decertification Order.

Several problems are immediately apparent with the trial court's interpretation. *First*, the trial court seemingly ignores *Houghton III*'s definitive bright-line interpretation of *McCoy* that the State must pay "its proportionate share of attorney fees if the recipient or his attorney requested consent from the State." *Houghton III*, ¶ 49. It continually refers to a "*McCoy* cause of action," even though *Houghton III* substantially explains and interprets *McCoy*. *McCoy*, in the year 2000, dealt with the attorney fees issue fairly briefly, in about 7 paragraphs. *McCoy* ¶¶ 13-19. In contrast, 21 paragraphs in *Houghton III* address attorney fees in great detail. *Houghton III* ¶¶ 31-51. How then could the trial court simply ignore *Houghton III's* definitive interpretation of *McCoy* as requiring a proportionate fee?

Second, the trial court fixates on the Supreme Court's "failure" to use the word "proportionate" in *McCoy*, but ignores repeated use of the word in *Houghton III*. R. 35, 39, 49. This is despite the fact that *Houghton III* is five years more recent and "the law of the case."

Third, the "totality of the circumstances standard" finds no support in *McCoy* or *Houghton III*. "Totality of circumstances" is a rather vague, indefinite standard. It is hard to fathom how such vagueness could devolve from *Houghton III*'s definitive language that "in ***all cases*** where the State satisfies its lien from proceeds procured through the efforts of a private attorney, the State is responsible for its ***proportionate share*** of attorney fees," if consent was requested. *Houghton III*, ¶ 49 (emphasis added). There is an apparent disconnect.

Fourth, the trial court is simply dead wrong when it says that there is "nothing in § 26-19-7 that requires the State to pay the same percentage of attorney fees to the recipient as the recipient is paying to his attorney." *See* cited portion in Point II.A. above; R. 4194, p. 21. The trial court criticizes Plaintiffs' repeated "attempt to connect the 'proportionate costs' section of § 26-19-7(4) to the attorney fees section, but the Utah Supreme Court rejected that approach in *McCoy*. 2000 UT at ¶ 16." *See* Provisional Order, R. 4194, p. 20, fn 10. To the contrary, however, this "approach" is exactly what the Supreme Court endorsed in *Houghton III*. *Houghton III*, ¶ 33-35, 39.

These points are elaborated below.

B. Trial Court Rejects and Criticizes *Houghton III*.

The trial court roundly rejected the Supreme Court's holding that the State is liable for its proportionate share of attorney fees on the procurement of

State lien reimbursement with consent. Instead, the trial court created its own standard of a "reasonable fee" being determined by the "totality of the circumstances," which is not found in either *McCoy* or *Houghton III.* The trial court held:

> In other words, ***the standard for determining reasonable fees is a totality of the circumstances standard.***
>
> . . . . .
>
> [T]here is nothing in the [*Houghton III*] court's use of the term "proportionate" to suggest that they [sic] are rejecting its use of the term "reasonable" in *McCoy* or that they [sic] intend "proportionate" to mean the same attorney fees as paid by the recipient to his attorney.

12/22/06 Provisional Order, p. 22, 27 (emphasis and parenthetical added), R. 4215, 4220. The trial court then substantially criticized this Court's *Houghton III* decision as "not completely consistent," as "never directly address[ing] how attorney fees" are to be calculated, and as "not [having] used uniform language" when referencing attorney fees under *McCoy.* 12/22/06 Provisional Order, p. 28, R. 4221. *See also,* Fact 6, above.

The comparison of the *McCoy, Houghton III* and trial court holdings is dramatic:

McCoy
(proportionate)

> We therefore conclude that under subsection (4) [Utah Code Ann. § 26-19-7(4)], ... the ***State must pay the attorney fees incurred in procuring the State's share*** of the settlement proceeds.

McCoy, ¶ 18 (emphasis and parenthetical added).

Houghton III
(proportionate, interpreting *McCoy* ¶ 18 passage above)

> [W]e return to the underpinnings of our decision in *McCoy*. In *McCoy,* we concluded that the State was obligated to pay ***a proportionate share of the plaintiff's attorney fees*** because the plaintiff complied with section 26-19-7 of the Medicaid lien statute. *Id.* ¶ 18.
>
> . . . . .
>
> Accordingly, ***in all cases*** where the State satisfies its lien from proceeds procured through the efforts of a private attorney, ***the State is responsible for its proportionate share of attorney fees*** if the recipient or his attorney requested a consent from the State.

Houghton III, ¶¶ 39, 49 (emphasis added).

Decertification Order
(rejects proportionate)

> For this reason, the Court will discuss the elements ***for a McCoy cause of action*** and then decide whether the class should be revised to conform to *McCoy* or should instead be decertified. ... The court will now review the ***elements that must be met under McCoy*** in order to recover attorney fees from the State.
>
> . . . . .
>
> In *McCoy,* the Utah Supreme Court ***never used the phrase "proportionate"*** to describe the State's share of attorney fees. ... [T]he *McCoy* court uses "reasonable."
>
> . . . . .
>
> There is ***nothing*** in § 26-19-7 that ***requires the State to pay the same percentage of attorney fees*** to the recipient as the recipient is paying to his attorney. ... In other words, the standard for determining reasonable attorney fees is a ***totality of the circumstances standard.***
>
> . . . . .
>
> [T]here is nothing in the [Utah Supreme] court's use of the term "proportionate" to suggest that they [sic] are rejecting its use of the term "reasonable" in *McCoy* or that ***they [sic] intend "proportionate" to mean the same attorney fees as paid by the recipient to his attorney.***

R. 4194, 12/22/06-2/15/07 Decertification Order, pps. 10, 19, 20, 21, 22 and 27 respectively (emphasis added). *McCoy*, ¶¶ 13-19. The trial court order thus rejects the proportional standard set forth in *McCoy* and *Houghton III* in favor of the newly created "totality of the circumstances" standard.

C. *McCoy*'s "Incurred in Procuring" Mandates a Proportionate Fee

McCoy specifically rejects the State's arbitrary "at its discretion" argument with respect to attorney fees:

> Moreover, the State provides ***no statutory, case law, or policy basis*** for limiting awards of attorney fees to those recipients ***to whom the State, at its discretion, grants consent.*** We see no justification for so limiting the ***relatively broad reach*** of subsection (4) in the case before us.

McCoy, ¶ 18 (emphasis added). Instead, *McCoy* characterizes subsection 7(4) as having a "relatively broad reach." *McCoy* then holds that "the State must pay the attorney fees ***incurred in procuring the State's share*** of the settlement proceeds." *McCoy,* ¶ 18 (emphasis added). The language "[i]ncurred in procuring" can only mean "proportionate." It means the same percentages incurred by the recipient in paying his/her attorney to recover the damages. The words "must pay the attorney fees" connote *obligation* as well as *lack of discretion.* What amount or percentage "must [the State] pay?" The answer: whatever "attorney fees [the recipient] ***incurred in procuring*** the State's share of the settlement proceeds." *McCoy*, ¶ 18 (emphasis and parenthetical added). In other words, the "proportionate" attorney

fee paid by the recipient to his/her own attorney (in almost all cases at least 33%) on the recipient's share would be in the same proportion as "the attorney fees incurred (by the recipient) in procuring the State's share." *McCoy,* ¶ 18 (parenthetical added).

Ironically, the trial court's opinion concedes that the above-cited *McCoy,* ¶ 18 "language is seemingly more consistent with the Plaintiffs' approach than with the Court's approach." R. 4221, p. 28. The trial court then contends that "no approach is going to be completely consistent with the Utah Supreme Court's language because the language itself is not completely consistent." *Id.* The court further criticizes the Utah Supreme Court as never having "directly addressed how attorney fees under *McCoy* should be calculated," and "not [having] used uniform language" when referencing an attorney fee award under *McCoy*. *Id.*

The decision then inexplicably makes the fundamental theoretical error of trying to determine the appropriate attorney fee formula by reference to *McCoy* alone, but ignores the contribution of *Houghton III.* R. 4222 (plaintiffs' approach is "inconsistent with the 'reasonable' language" in *McCoy*). The trial court holds that a *McCoy* "reasonable" fee is the proper standard and "that 'reasonable attorney fees' under *McCoy* should be determined by examining the totality of the circumstances under which the recipient procured the State's recovery." R. 4222. The problem with using *McCoy* alone is that it was decided

in the year 2000. But *Houghton III,* in the year 2005, resolved any latent ambiguities that might have existed in *McCoy*. Using *McCoy* without *Houghton III* contributes to the trial court's fundamental misinterpretation.

D. *Houghton III* "Obligates" Proportionate Attorney Fees.

Neither *McCoy* not *Houghton III* set forth a "totality of the circumstances" standard proposed by the trial court. *Houghton III* confirms *McCoy's* interpretation of the statutory language and "obligates" payment of "a proportionate share of . . . attorney fees":

> We did, however, allow McCoy to recover ***a proportionate share of his attorney fees*** from the State, reasoning that McCoy had "followed the requirements of the Act" by asking for the State's consent.
>
> * * * * *
>
> In *McCoy,* we concluded that the ***State was obligated to pay a proportionate share of the plaintiff's attorney fees because the plaintiff complied with section 26-19- 7 of the Medicaid lien statute.*** We based this conclusion on the fact that McCoy had ***requested consent*** to pursue the State's claim.

Houghton III, ¶¶ 35, 39 (citing *McCoy,* ¶ 18) (emphasis and double emphasis added). After a lengthy 48-paragraph discussion of the history of the attorney fees issue, the *McCoy* case and the Medicaid Reimbursement Statute, this Court held unequivocally that the State was responsible for a "proportionate share of attorney fees" in "all cases" where "the recipient or his attorney requested consent from the State." *See Houghton III,* ¶ 49. The *Houghton III* Court then concludes, based on *McCoy*:

> Under the general holding of *McCoy,* the State is ***obligated*** to pay its share of a recipient's private attorney fees if ***either*** (1) ***the State consents*** to the recipient's request to represent its interest; ***or*** (2) ***the State satisfies its lien*** from proceeds procured through the efforts of a recipient's private attorney in those cases where the recipient ***requested, but was denied, consent.***

Houghton III, ¶ 51 (emphasis and double emphasis added). Thus, *Houghton III* unmistakably interprets **both** the *statute* and *McCoy* to "obligate" the State to pay "a proportionate share of the plaintiff's attorney fees" where the State has "consented to the representation," or the recipient "requested consent." *Houghton III,* ¶¶ 38, 39, 40. The trial court's totality of the circumstances standard is incompatible with "obligated to pay a proportionate share," as adopted by both *McCoy* and *Houghton III.* The use of the word "**obligated**" speaks volumes in characterizing the State's legal responsibility to pay a "proportionate share" of attorney fees.[11]

It is also obvious that *Houghton III* is using "proportionate share of attorney fees" and "fair share of attorney fees" synonymously, as it uses both terms in the same context in *Houghton III,* ¶ 49. The trial court's vague "totality of the

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[11] A word search of the opinion reveals that a form of the word "obligated" is used in this identical context **13 times,** and "responsible for" is used once more in that same context. *Houghton III,* ¶¶ 39, 40[2], 41[3], 42, 43[2], 44, 48[2], and 51 ("obligated" or "obligation"), and ¶ 49 ("responsible"). The word "proportionate" is specifically used three times in conjunction with "obligation" or "responsibility" to pay fees. *Houghton III,* ¶¶ 39, 48 and 49. *Houghton III* further uses the word or concept of an "obligation" of the State to pay its "fair share" of attorney fees another three times. *Houghton III,* ¶¶ 42, 44 and 49.

circumstances" text is simply incompatible with the State's non-discretionary "obligation" to pay a "proportionate share" of fees. This court should have no problem finding these three ¶ 51 criteria (*lien recovery* through the efforts of recipient's *attorney* plus *consent*) to be the only essential requirements for class certification.

Additionally, the trial court's"totality of the circumstances" standard dooms the class because a multitude of disparate circumstances and criteria allegedly determine a "reasonable" attorney fee. R. 4200-4222, 4233-4239. According to the trial court, this would result in "numerous individual mini-trials that would defeat the desired efficiency of having a class action case." R. 4239. The "individual fact intensive inquiry ... makes certifying a class of Plaintiffs ... inappropriate." *Id.* Accordingly, the trial court's rejection of *Houghton III* and adoption of the erroneous "totality" standard leads directly to the decertification due to lack of predominance, which destroys a key class requirement.

The restoration of the correct legal standard would in essence result in a mandatory finding that the class was correctly certified. This is so because if the State owes a proportionate share of attorney fees on its lien recovery in "all cases" where consent is requested, the State will always pay whatever share the recipient pays, which was clearly the intent in *McCoy* and *Houghton III.* Thus, the

fee is susceptible to calculation in a mathematical formula, which is appropriate for class action resolution. *See* Section E below.

E. Proper Construction of the Statute Mandates "Proportionate Share."

During almost all of this litigation, until the year 2005, the statute in effect was exactly as quoted herein.[12] It mandated "proportionate share":

> (4) The department may not pay more than 33% of its total recovery for attorney's fees, but ***shall*** pay a ***proportionate share of the costs in an action*** that is commenced with the department's written consent.

Medical Benefits Recovery Act, Utah Code Ann. § 26-19-7(4) (1995), as cited in *McCoy,* ¶ 16 and *Houghton III,* ¶ 33 (emphasis and double emphasis added). Read in context with other provisions, the language of the statute requires the State to pay proportionate attorney fees, even without reference to *McCoy* or *Houghton III.*

E.1. Not Just Proportionate "Costs."

The trial court and defense counsel claim that the "proportionate" language in the statute applies only to an attorney's out-of-pocket **costs,** but not attorney **fees.** R. 3861-3862; 4212-4213. A few sentences of *McCoy* are susceptible to that erroneous interpretation, if taken out of context. *See McCoy,*

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[12] In 2005, the Legislature amended the statute to confirm what essentially was already the law, i.e., the payment of an attorney fee at 33.3% "of the department's total recovery," as well as "a proportionate share of the litigation expenses directly related to the action." Utah Code Ann. § 26-19-7(2)(c)(ii) (2005). *See* Fact 24.

¶¶ 16, 17. When those sentences are viewed in the context of the entire case, especially *McCoy* ¶ 18 as explained in *Houghton III* ¶¶ 35, 39, 51, those sentences simply cannot be read as requiring anything but an assessment of a *proportional fee*.

First, McCoy, ¶ 18 says that it applies to "fees" ("must pay the attorney *fees* incurred in procuring the State's share"). *Second, Houghton III,* ¶¶ 35, 39, 51 affirm that a "proportionate" fee is what *McCoy,* ¶ 18 means. *Third,* the *Houghton III* "proportionate share" holding is clearly the "law of the case" for us. *Houghton III,* ¶¶ 49, 50, 51. *Fourth,* it is almost incomprehensible that the subject statute would provide assessment of proportionate attorney "costs," while in the very same sentence, require a "totality of the circumstances" standard for fee assessment. This would mean that the Legislature, in a short, one sentence statute, intended two different legal standards to apply, one standard for *costs*, but a different one for *fees*. That is incomprehensible. Furthermore, why would the Legislature be specifically concerned about out-of-pocket attorney "costs"?

Section 26-19-7(4) represents an acknowledgment that when a recipient's attorney recovers the State's lien, there is always going to be a proportionate attorney fee owed if consent was requested. The purpose of the statute is obviously to protect that expectation interest, not to draw some artificial distinction between fees and costs. Thus, it is clear that the Legislature used the term "in an action" to refer to its antecedent in the statute, i.e., "recovery for

attorney fees." That is about exactly how one would expect a lay member of the Legislature to view "attorney fees," i.e., as one of the "costs of litigation." In short, the appropriate way to read the statute is that the State may not pay a fee "more than 33%," but shall pay at least its proportionate share of the attorney fees, up to 33%.

E.2. Internal Structure.

The internal structure of the statute is pretty clearly intended to set forth rules protecting **both** the State and the recipient in third party actions. Generally, consent is required to represent the State's interest and the State is not bound without that consent. Utah Code Ann. § 26-19-7(2)(a)(b). To that end, the statute deals with the realities of who owes what, when the recipient's lawyer, who probably has the case on a 1/3 contingent fee, recovers the State's lien amount. It hardly seems accidental or happenstance that the statute uses virtually the exact language of a "33% contingent fee."

It makes sense that Section 7 would address the benefits of securing consent, along with the penalties of not having it. Subsection 7(4) does exactly that. It assumes that consent has been requested and granted. *See* Subsections 7 (1), (2), and (3). Such a litigant is then rewarded for getting consent. The reward? Under Subsection 7(4), the State "shall" pay a proportionate share of the attorney fees recipient has already paid to the attorney in order to get the recovery for the

State. In other words, the recipient gets a lien reduction in the same contingent fee percentage he/she is paying his lawyer, not to exceed 33%, as a reward for getting consent.

E.3. Discretion Argument Not Logical in Context of Whole Statute.

Rhetorically, does it make any sense that the Legislature would leave the amount of the attorney fee to the whimsical discretion of a state agency, as urged by the State and endorsed by the trial court? R. 4214-4215. The trial court suggested there are many individual factors that go into determining a "reasonable fee," and that the agency (ORS) is somehow equipped to make this determination. R. 4235-4239. Why would our Legislature ignore the ubiquitous one-third attorney's fee in personal injury cases?

The Legislature would surely have considered the *context* of how the issue will arise when it drafted Subsection 7(4) in 1995. That context is important. After obtaining consent, the recipient, through his counsel, will generally sue a third party tortfeasor. At some point, there is a settlement or a judgment. Assume the recipient is paying his attorney a one-third contingent fee on the gross recovery, as is customary. *See* Affidavits of Colin King and Steve Sullivan, R. 3778-3782, 3784-3788. Thus, whatever segment of that recovery represents the State's Medicaid lien should bear the same proportionate share of the fee that the recipient has already paid to recipient's attorney. Any sensible

citizen-legislator would see that as eminently fair. Not surprisingly, that's exactly what the statute does by requiring the payment of "a proportionate share" of the cost of an action, but "not ... more than 33%" of the total lien recovery for attorney fees.

E.4. Meaning of the Condition.

The sentence comprising Subsection 7(4) has a condition, but uncharacteristically begins with the condition rather than having the condition at the end of the sentence, as is more customary. For example, one may say "you may go to the store, but you may not spend more than $100." Normally, however, the limiting condition can be put at the front of the sentence without any loss of meaning, such as "you may not spend more than $100 when you go to the store." In the case of Subsection 7(4), the same is true, but *putting the condition last* makes the sentence more clear, as follows:

> The department shall pay a proportionate share of the litigation costs of an action that is commenced with the department's written consent, but shall not pay more than 33% of its total lien recovery for attorney fees.

In summary, the statute must be read in the context of what the Legislature is trying to do. *McCoy* did exactly that in the year 2000, and *Houghton III* confirmed this interpretation. The statute rewards recipients who requested consent with a proportionate fee reimbursement. Knowing that most attorneys charge a one-third fee, it is clear from the statute itself that the legislature intended

to impose on the State a similar proportionate fee on lien reimbursement, not to exceed 33%.

F. *McCoy-Houghton III* Formula Is Practical, Easy to Apply.

The *McCoy/Houghton III* formula works very well, is easy to use and applies fairly in the everyday practice of personal injury law. It easily meets all Rule 23 criteria.

Assuming the attorney fee to be 33%[13] on a $30,000 settlement with a $10,000 Medicaid lien, the fee would be $9,900. Medicaid would be paid $6,700 on its $10,000 lien. The other $3,300 would go directly to the recipient, because the attorney has already been paid on the gross. Thus, the recipient would receive **$13,400,** with the State's contribution of $3,300 to the recipient on the $10,000 lien recovery. The attorney fee to the recipient stays the same, but $3,300 of it now comes from the Medicaid lien reimbursement. The math is as follows:

With Proportionate 33% Fee Reimbursement:

$30,000	Settlement
- $9,900	Attorney Fee (33%)
- $6,700	Medicaid Lien Reimbursement ($10,000 Lien minus 33% Fee Assessed Against Lien Amount)
$13,400	Net to Recipient

[13] For purposes of simplicity and ease of calculation, the attorney fee on a personal injury claim in this Brief is assumed to be 33%, although in reality most are 33-1/3% or sometimes 40%.

The recipient is hurt when the State *pays less than its proportionate fee* on its lien reimbursement, as the following example illustrates:

With a 20%[14] Medicaid Fee Reimbursement:

$30,000	Settlement
- $9,900	Attorney Fee (33%)
- $8,000	Medicaid Lien Reimbursement [$10,000 - 20% Fee]
$12,100	Net to Recipient

The 20% lien reimbursement shorts the recipient $1,300. Another common fee reimbursement was 25%, which shorts the recipient $800.

The trial court believed the proportionate formula to be impractical, claiming that it would result in non-uniformity of the formula for damages. R. 4239. This represents a misunderstanding of personal injury law and the proportionate formula. Does the proportionate formula still work with other fee arrangements? Yes. Let us suppose for whatever reason, the attorney charged a 15% fee in the same example above. The deduction from the lien would be 15% of the $10,000 lien, or $1,500. This is eminently simple and fair. Suppose the attorney knows the recipient in a church context and agrees to charge a flat fee of $2,000 on a $30,000 settlement with a $10,000 lien. The proportionate fee there is simply $2,000/$30,000 or 6.66%, which means that the $10,000 Medicaid lien would be reduced by only $666. Again, a proportionate fee formula is always a

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[14] State commonly paid a fee of 20 or 25% instead of a full proportionate 33%. Sometimes it paid less. *See* Facts 8, 9.

simple mathematical calculation. There is no possible fee scenario does not lend itself to easy and quick calculation for all members of the class, because the formula works with any percentage fee, or even a flat fee.

POINT III

~ Class Criteria Should Be Clearly Defined by the Court ~

THIS COURT SHOULD RULE UNEQUIVOCALLY THAT THE CLASS CRITERIA ARE 1) A STATE LIEN REIMBURSEMENT, 2) OBTAINED BY RECIPIENT'S ATTORNEY, 3) WITH STATE CONSENT OR REQUEST FOR CONSENT.

It would greatly advance the resolution of this case if this Court would formally set forth the criteria necessary to qualify for class status. We are not asking for anything novel, since the Court has already done this in *Houghton III* when it held:

> Accordingly, in ***all cases*** where the State **[1]** ***satisfies its lien*** from proceeds procured through the efforts of a **[2]** ***private attorney,*** the State is responsible for its proportionate share of attorney fees if the recipient or his attorney **[3]** ***requested consent*** from the State.

Houghton III, ¶ 49 (parenthetical numbers and emphasis added). "All cases" means all potential class members qualified under the following criteria:

a) **Lien reimbursement** ("the State satisfies its lien");

b) **By a private attorney** ("from proceeds procured through the efforts of a private attorney"); and

c) **Consent** ("if the recipient or his attorney requested consent from the State").

The parenthetical criteria are taken directly from the language of *Houghton III*, ¶ 49. In short form, they represent the common criteria of lien reimbursement, through a private attorney, with a consent request. Where those common criteria are present, i.e., in "all cases," the State "is responsible for its proportionate share of attorney fees." *Houghton III,* ¶ 49. This is a very sensible ruling since those three criteria are all that matter. They are common to all potential class members. Everything else is irrelevant to class certification and the ultimate litigation of the issue.

This request should not be seen as seeking an advisory opinion because a ruling on this matter would "have a meaningful effect on the parties." *Houghton III,* ¶ 26 (internal quotes omitted). The resolution of the this matter once and for all will define the parameters of this litigation as it moves forward. Each party will understand exactly what needs to be proved to qualify for the class. It will also eliminate discovery disputes because discovery can now focus on what is important. Therefore, it is quite proper for the Supreme Court to rule on this issue.

These common class criteria are not hypothetical, and they do have "a bearing on the scope" of the decertification order. *Id.* at ¶ 28. The issue of the common class criteria definitely needs to be addressed in the course of this litigation because commonality is required. When this case is remanded to the trial

court, these suggested class criteria will determine the scope of the class, the qualification of individuals for class status, and the discovery on those potential members.

Given the duration of this litigation, it seems prudent to have the issue of the class criteria brought before this Court at this time. This commonality issue must ultimately be resolved at some time and it will ultimately end up being decided by the Supreme Court anyway, so why not now? This will avoid additional delays and appeals, so this case can move ahead more quickly to a final resolution.

The trial court conceded that the other three of the four Rule 23 class action requirements are met in this case. R. 4227-4228 ("the Court will assume that requirements three and four regarding ***typicality*** of claims and ***adequacy*** of representation have been met" (emphasis added)). ***Numerosity*** is also present. R. 4229-4230 ("the Court will assume for now that the numerosity requirement has been met").

However, the court found that "common issues" did not predominate because of application of the totality of circumstances standard. 12/22/06 Provisional Order, R. 4231-4239. The court observed that "there are numerous other individual questions that would be involved" (R. 4237), that damages could not "be calculated using a mathematical formula" (R. 4239), and that this would

result in "numerous individual mini-trials that would defeat the desired efficiency of having a class action case." R. 4239. The court went on to list those "individual" factors that precluded commonality and thus class certification, including "how much investigation has been done on the case prior to the request [for a consent]," "the likelihood of settlement without a trial," whether or not liability or causation "was aggressively contested," the "complexity of the case," and the "experience, reputation and ability of the lawyer" for the recipient. R. 4237 (other similar "individual inquiries" were listed). The court concluded "there is little question that the individual questions involved in this fact-intensive inquiry would predominate over the common question in this case," R. 4194, p. 44.

However, it is clear from *Houghton III* that these concerns are quite irrelevant if the three common factors listed above, which apply to "all cases," are the common class requirements. For example, if the State **must pay** its proportionate fair share of the attorney fees on a lien recovery by recipient's attorney with consent, and all three of those common criteria are met, what possible difference would it make whether or not the underlying tort litigation was risky or not? Or the extent of the experience level of plaintiff's counsel? Or any of the other criteria listed by the trial court? 12/22/06 Provisional Order, R. 4236-7. None of those factors make any difference as to whether or not there was a lien recovery by recipient's attorney, with consent. In other words, since none of those

factors listed in the trial court's order is relevant, the class should simply be certified with the *Houghton III*, ¶ 49 criteria as the common issues that unite the class. These three common criteria are fair, easily understood and capable of simple, mathematical calculation. Accordingly, this class action is an ideal remedy for a factual dispute such as this.

POINT IV

~ Full Discovery Would Assist in Rapid Resolution ~

FULL DISCOVERY WOULD ASSIST IN MOVING THE CASE FORWARD TO RAPID RESOLUTION BECAUSE RELEVANT INFORMATION NECESSARY TO DETERMINING CLASS MEMBERSHIP HAS BEEN EXTREMELY DIFFICULT OR IMPOSSIBLE TO GET GIVEN THE LIMITED DISCOVERY ALLOWED BY THE TRIAL COURT.

In September 2005, this Court ordered full discovery on remand. *Houghton III*, ¶¶ 38, 28 (not allowing factual development under the general holding of *McCoy* "would artificially and illogically restrict discovery and, concomitantly, the size of the potential class." *Houghton III,* ¶ 38). Until "the facts surrounding the claims of ***each potential class member*** have been developed, it will be impossible for the court to assess whether they fall within the general holding of *McCoy.*" *Houghton III,* ¶ 38 (emphasis added). Despite this full-discovery admonition, the trial court instead immediately focused on decertification and allowed only limited discovery.

At the first hearing after *Houghton III*, on January 13, 2006, the trial court suggested *sua sponte*:

> Let me tell you where I think we are with respect to this case. There remains to be decided a Motion to Decertify the Class and I think that we need to get that decided and find out ***whether or not we're going to be proceeding as a class action before we can really proceed any further in this case.***
>
> * * * * *
>
> So there is, at least on the basis of the record before me, ***no common issue that would justify the case continuing as a class action*** but I want to be fully informed on that issue and rereading the briefs, the ***State's position was that there is no need for discovery*** for me to determine that the individual claims predominate over any common questions that may exist in this case.
>
> * * * * *
>
> So this is how I propose to proceed. I would like the State to respond fully to plaintiffs' request for production of documents with respect to ***50 claims***. . . .

R. 4337, Official Transcript 01/13/06 Hearing, pps. 1-3, prepared by Carolyn Erickson, CSR, on 7/19/07; R. 2013, hearing of 1/13/06 (emphasis added).

A few months later, at the request of plaintiffs, this was expanded to allow discovery on all of the potential class members, **but only to a severely limited scope.** For example, counsel was prohibited from contacting the attorneys or the Medicaid recipients on the underlying lien. Plaintiffs were *allowed only one deposition*. Most importantly, the State was <u>not</u> required to specify, admit or deny

the existence of class criteria as to the 2,786 potential cases. *See* Official Transcript 01/13/06 Hearing, R. 4337; R. 2162, p.4.

Thus, before any discovery had even taken place, the focus was to be on potential decertification. The trial court's encouragement to file another motion for decertification found willing ears, and Defendants did exactly that on February 17, 2006. R. 2087. Class decertification was confirmed as a "final order" on February 15, 2007, 11 years after the class was first certified. R. 4291. *See also* Facts 1 and 2.

The trial court has enabled the State in its repeated attempts to delay and limit discovery. Time and time again "the State fired up its motion machine" (*Houghton III,* ¶ 11) and frustrated each discovery attempt with motions for a protective order or for summary judgment, so that no discovery was had until 2006. R. 106, 608 and 802. Judge Quinn's 2003 ruling limiting the scope of discovery was appealed and this Court held that the "district court adopted an erroneously narrow view of our holding in *McCoy*." *Houghton III,* ¶ 50. This Court reversed and remanded with "instructions to modify the scope of the discovery order consistent with this opinion." *Id.* Instead, the trial court allowed only narrow discovery focused on whether the class should be decertified. Fact 1 above; Official Transcript 01/13/06 Hearing, R. 4337; R. 2047, Order Re: Production of Documents, Confidentiality, and Briefing of Class Certification of Issues.

Nearly every attempt by Plaintiffs to get relevant and crucial information through discovery has been frustrated by the State and tolerated by the trial court. Plaintiffs need information, including requiring the State to specify for every claimant what percentage attorney fee was paid by the State, and whether a request for consent was made. To do this, Plaintiffs will need to take further depositions of ORS personnel, particularly those who worked during the 1991-2001 period, before Brent Perry's time. Plaintiffs must not be denied permission to contact recipients and/or their attorneys for additional information not contained in the spoliated files (which permission was denied by the trial court). Pinpoint and targeted Requests for Admission and interrogatories will provide this critical information that is necessary to establishing Plaintiffs' case and qualifying most of the 2786 persons, perhaps more, for class membership. Therefore, Plaintiffs request that this Court put an end to the curtailing of discovery and order full, unrestricted discovery upon remand.

CONCLUSION

The petition, as explained herein, was timely filed and this Court does have jurisdiction to review the decertification order. The trial court's decertification order has basically gutted the case. All that remains behind are the relatively minuscule claims of the four class representatives. The court's decertification order essentially terminates the litigation, for all practical purposes. Accordingly, at a

very minimum, it makes sense for this Court to reverse the Decertification Order and straighten out the lower court's erroneous rulings whereby the trial court adopted a new, nonstatutory "totality of circumstances" standard for determining attorney fees, rather than by a "proportionate fee" as determined in *Houghton III.* It makes no sense to defer the decision on this case for the year or so that it will take to work out these underlying named class members' claims, while the trail grows colder on the class action which was certified about 12 years ago.

The additional issues in Points III and IV should also be heard at this time. They are heavily class-related and are critical in determining the size of the class. Resolution of these issues will be "meaningful" in that rulings thereon will clear the runway of clutter and move the case forward much more rapidly. These issues will all have to be resolved at some point in time, and now is a good time to do it given the procedural posture of the case.

As this Brief is signed, this case is a day shy of entering its thirteenth year of litigation (it was filed on 10/27/95). It should be a priority to avoid as much undue delay as possible in order to get this case resolved more quickly. The trial court's erroneous rulings need correction. This correction, together with the other pending issues, present a situation in which delay can be avoided and ultimate resolution of the case aided.

DATED this 26th day of October, 2007.

ROBERT B. SYKES & ASSOCIATES, P.C.

ROBERT B. SYKES
ALYSON E. CARTER
Attorney for Plaintiffs and Appellants

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Appellants** was served upon counsel for Defendants/Appellees, at the address listed below by first-class U.S. mail, postage prepaid, on this 26th day of October, 2007:

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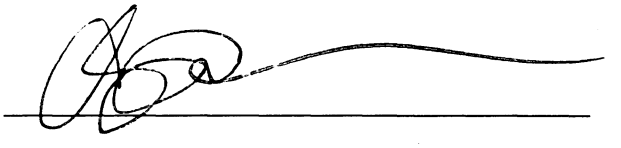

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LIST OF ADDENDA

1. December 22, 2006 Provisional Decertification Order [R. 4194-4248]
2. January 9, 2007 letter to Judge Quinn [R. 4249-4250]
3. January 12, 2007 Minute Entry [R. 4254]
4. February 15, 2007 Final Decertification Order [R. 4291-4295]
5. May 30, 2007 Order Granting Interlocutory Appeal [R. 4318-4321]

Addenda

Tab 1

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PAUL HOUGHTON, *et al.*, Plaintiff, vs. DEPARTMENT OF HEALTH, THE OFFICE OF RECOVERY SERVICES, THE DEPARTMENT OF HUMAN SERVICES, *et al.*, Defendants.	**ORDER ON MOTION FOR DECERTIFICATION** Case No. 950907491 Judge Anthony B. Quinn

The above matter came before the Court on December 14, 2006 for oral argument on the following four motions: Defendants' Renewed Motion for Decertification of Class Action Status, Plaintiffs' Motion for Partial Summary Judgment Determining Class Criteria, Plaintiffs' Motion to Amend the January, 1996 Order Certifying the Class to Conform to Supreme Court Opinions, and Plaintiffs' Motion for Partial Summary Judgment Determining that Consent is Not Required in Certain Cases where the Request would be Futile or would Result in Questionable Ethical Problems for Counsel. All four motions are interrelated and because the Court's decision on Defendants' Renewed Motion for

Decertification will necessarily decide the other three motions, the Court's discussion will focus primarily on the motion for decertification.

I. BACKGROUND

This lawsuit was filed on October 27, 1995. It has been litigated for over 11 years and has been addressed by the Utah Supreme Court three times. Countless motions have been filed and heard and the underlying law in this case has been developed and refined over the years both in this case and in other cases. Because of the many cases the Utah Supreme Court has heard in this area over the past 11 years, the current lawsuit before the Court is drastically different than the lawsuit filed in 1995.

A. Original Claims

The original Complaint filed had seven causes of action, all of which arose out of essentially one allegation. The Plaintiffs alleged that *Utah Code Annotated* § 26-19-5(1), which gave the State of Utah (the "State") a priority "lien against any proceeds payable to the recipient by . . . [a] third party," violated a federal Medicaid statute, 42 U.S.C. § 1396p(b)(1), which states that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance

paid or to be paid on his behalf under the State plan. . ." All seven causes of action relied on this allegation that the Utah lien statute violated federal law.[1]

B. Original Class Certification

In addition to the seven causes of action, the original complaint also requested class certification. On January 29, 1996, Judge Pat Brian,[2] based on an unopposed motion to certify the matter as a class action, entered an order certifying two classes. Judge Brian determined that "there are questions of law or fact common to the classes, particularly whether or not the State of Utah violated federal law in asserting liens on the

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[1] The First Cause of Action was for declaratory and injunctive relief. The Second Cause of Action was to recover the money allegedly taken by the State's wrongful liens. The Third Cause of Action was that the State's lien process violated due process. The Fourth, Fifth, Sixth, and Seventh Causes of Action were respectively for fraud, negligent misrepresentation, mistake, and civil rights violations based on the purportedly illegal liens.

[2] Three separate judges have presided over this case since it was filed in 1995. Judge Brian was the original judge on the case. After Judge Brian's retirement in 1999, the case was assigned to Judge Ronald Nehring. Judge Anthony Quinn, the current judge on this case, was assigned to the case in 2003 after Judge Nehring was appointed to be a Utah Supreme Court Justice.

claims, settlements and judgments of class members to reimburse itself for Medicaid assistance paid. . . ."

The two classes certified both involved individuals who were injured by the acts of a third party, became Medicaid recipients, had medical bills that were paid in whole or in part by the State, and who subsequently undertook a third party liability action against the third party who injured them, resulting in the imposition of a lien by the State. The first class of plaintiffs were those who did not retain counsel in pursuing their claims against liable third parties. The second class of plaintiffs were those who did retain counsel in their pursuit of liable third parties.

C. Validity of Utah Medicaid Lien

Since this case has been filed, the validity of the State's Medicaid lien has been addressed in a number of cases. The Utah Supreme Court first addressed the validity of the State's Medicaid liens in 1998, issuing opinions on the subject in two separate cases on the same day.

In the first case, *S.S. v. State of Utah*, a minor was severely and permanently injured when he was struck by a drunk driver. 972 P.2d 439, 440 (Utah 1998). The minor's father

received Medicaid assistance on his behalf and the minor subsequently reached a settlement agreement against the drunk driver. *Id.* The State then asserted its statutory lien on part of the settlement proceeds to recover its Medicaid expenses. *Id.* The trial court refused to allow the State to recover its lien because, *inter alia*, the trial court found that the State lien violated the federal Medicaid statute, which prohibited liens against the property of an individual for medical assistance paid by Medicaid. *Id.* at 442.

On appeal, the Utah Supreme Court reversed the trial court. Citing a New York Court of Appeals case that had recently faced the same issue, the Utah Supreme Court held that because the Medicaid recipient is required to assign to the State its right to recover medical expenses paid by Medicaid, the State's lien attaches to the liable third party's property, not to the Medicaid recipient's property. *S.S.*, 972 P.2d at 442. Therefore, the Utah Medicaid statute did not violate the federal Medicaid statute because it did not give the State a lien on the Medicaid recipient's property. *Id.*

The validity of the State's lien was also contested in *Wallace v. Estate of Nichole Jackson*, where another minor was

injured in an accident, received Medicaid assistance, and had the State assert its Medicaid lien on settlement proceeds recovered by the recipient from a third party. 972 P.2d 446, 447 (Utah 1998). Similar to the minor in *S.S.*, the minor contended that the State's Medicaid lien violated the federal Medicaid statute. *Id.* The Utah Supreme Court noted that in *S.S.*, it had held that "payments made by a liable third party do not legally become the property of the recipient until after a valid settlement which must include reimbursement to the State for Medicaid benefits." *Id.* at 448. This holding in *S.S.* led the court to conclude in *Wallace*, as it had in *S.S.*, that "the federal anti-lien statute is not violated when the State seeks reimbursement . . ."[3] *Id.* These two cases ended the Plaintiffs' primary allegation that the State's Medicaid lien violated federal law.

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[3] The contexts of *S.S.* and *Wallace*, however, were slightly different. In *Wallace*, the State was attempting to recover its lien in the context of an interpleader action, rather than in direct litigation with the Medicaid recipient as in *S.S.*. *Wallace*, 972 P.2d at 447. The Utah Supreme Court, however, made clear that the State's right to recover its lien was not affected simply because an interpleader had been filed. What mattered was not the circumstances under which the third party proceeds were being held, but the fact that the State had a valid lien on the proceeds. *Id.* at 448.

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However, while the instant case continued in litigation, the Utah Supreme Court decided *State of Utah v. McCoy*, which held that in certain circumstances, a Medicaid recipient could recover attorney fees from the State. 2000 UT 39 ¶ 20, 999 P.2d 572. In *McCoy*, the Medicaid recipient had complied with the Medicaid statute by requesting consent from the State to represent the State's claim against the third party. *Id.* at ¶ 3. After the State refused to grant consent, the Medicaid recipient excluded the State's claim in his recovery efforts against the third party. *Id.* at ¶¶ 3-4. Despite the State's denial of consent and the exclusion of the State's claim, once the Medicaid recipient had recovered against the third party, the State filed an action against the Medicaid recipient contending that it was entitled to recover its lien from the proceeds procured by the recipient. *Id.* at ¶ 6.

Despite the unfairness of allowing the State to satisfy its lien after the Medicaid recipient had complied with the statute by requesting consent and excluding the State's claim, the Utah Supreme Court found that the Medicaid statute permitted such a result. *McCoy*, 2000 UT at ¶¶ 11-12. However, the court also found that where the State satisfied its lien through the efforts

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of the Medicaid recipient's attorney, the State was responsible to pay the recipient reasonable attorney fees. *Id.* at ¶ 18. Therefore, *McCoy* opened the door for at least some of the Plaintiffs in this case to continue the litigation since all of the Class II Plaintiffs had retained attorneys and therefore could potentially recover some of their attorney fees from the State.

Although the Utah Supreme Court's decisions in *S.S.* and *Wallace* had ended the Plaintiffs' claim that the State's lien violated federal law, the Plaintiffs continued to litigate the validity of the State's lien contending that although the lien itself did not violate federal law, the lien's "priority" status did. The Utah Supreme Court rejected the Plaintiffs' argument in *Houghton v. Dep't of Health*, repeating its prior holdings that the State's lien was not a lien on the Medicaid recipient's property, but on the third party's property. 57 P.3d 1067, 1069 (Utah 2002). Therefore, the "priority" status of the lien was irrelevant and did not violate the federal Medicaid statute.[4] *Id.*

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[4] The Plaintiffs filed a writ of certiorari to the United States Supreme Court, but the court declined to hear the appeal. *Houghton v. Dep't of Health*, 538 U.S. 945, 945 (2003). However, three years later in an unrelated case, the U.S. Supreme Court held that federal Medicaid law prohibited a state from recovering

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As for recovery of attorney fees under *McCoy*, the Utah Supreme Court further clarified *McCoy* in *State of Utah v. Streight* and in a third appeal in the current case. In *Streight*, the Utah Supreme Court held that a Medicaid recipient could not recover attorney fees from the State unless it had requested consent from the State to represent the State's claim. 2004 UT 88 ¶ 16, 108 P.3d 690. In other words, requesting consent was mandatory in order to recover any attorney fees from the State. The court further clarified *McCoy* in the current case's third trip to the Utah Supreme Court by holding that, unlike the consent requirement, a Medicaid recipient's failure to exclude the State's claim did not prevent the Medicaid recipient from recovering attorney fees. *Houghton*, 2005 UT 63 ¶ 48, 125 P.3d 860.

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an amount in excess of the recipient's recovery for medical expenses. *Arkansas Dep't of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006). This ruling effectively overruled *Houghton's* holding that the State of Utah could recover its Medicaid payments from third party settlement proceeds that did not represent a recovery of medical costs. In light of *Ahlborn*, the Plaintiffs filed a motion asking the Court to reinstate its original claims. However, because *Ahlborn* was not a direct appeal from *Houghton* and the issue had already been definitely decided by the Utah Supreme Court, the Court denied the motion on the basis that the Court had no authority to revisit the issue.

As the above discussion shows, the legal landscape has changed dramatically since this case was filed and certified as a class action in 1995. The essential cause of action of the original complaint is vastly different from the current claim for attorney fees. After 11 years of litigation and several Utah Supreme Court decisions, the only viable claim left is an implied cause of action for attorney fees based on *McCoy*, decided five years after this litigation commenced. However, despite these dramatic changes, the class has never been reevaluated in light of the current state of the law after *McCoy*. For this reason, the Court will discuss the elements needed for a *McCoy* cause of action and then decide whether the class should be revised to conform to *McCoy* or should instead be decertified.

II. Elements of *McCoy* Cause of Action

As discussed above, the Plaintiffs' original claims have been rejected by the Utah Supreme Court and the only remaining claim left is the implied cause of action for attorney fees recognized in *McCoy*. The Court will now review the elements that must be met under *McCoy* in order to recover attorney fees from the State.

A. Plaintiffs' *Prima Facie* Case Under *McCoy*

In order to recover attorney fees from the State, each Plaintiff must show the following: (1) the Plaintiff was represented by counsel in a third party liability claim, (2) the Plaintiff requested consent from the State to represent the State's Medicaid claim, (3) the State satisfied its Medicaid lien from proceeds recovered through the efforts of the Plaintiff, and (4) the State did not pay the reasonable attorney fees it was obligated to pay the Plaintiff. Each of these elements will be discussed in turn.

1. Represented by Counsel

Both the Plaintiffs and the State agree that in order to recover under *McCoy*, the Medicaid recipient must have been represented by counsel in a third party liability claim. All that a Plaintiff must show under this element is that the recipient was represented by counsel at the time the lien was paid.

2. Request for Consent

The second element of a *McCoy* cause of action is that the Plaintiff must have requested consent from the State to represent the State's Medicaid claim. Although the Plaintiffs generally

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acknowledge the consent requirement, the Plaintiffs ask this Court to find that where a request for consent would have been futile because of purported State policies, the consent requirement should be "relaxed." However, there is nothing in the statute or case law that justifies relaxing the *McCoy* consent requirement. *Utah Code Annotated* § 26-19-7(1)(a) expressly states that,

> A recipient ***may not*** file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance, ***without the department's written consent***. (1995) (emphasis added).

This statutory language requiring consent[5] is mandatory and provides no "futility" exception or any other exception.

Moreover, the Utah Supreme Court and the Utah Court of Appeals have repeatedly stated that a request for consent is a prerequisite to recovering attorney fees from the State. *See Camp v. Office of Recovery Services*, 779 P.2d 242, 248 (Utah Ct. App. 1989) ("Although subsection 26-19-7(4) may authorize an award of attorney fees to some Medicaid recipients, the fees must

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[5] Of course, in order to obtain consent, one must first **request** consent, which is the requirement at issue here.

be in connection with the commencement of an action, and ***the action must be commenced with the State's written consent.***") (emphasis added); *McCoy*, 2000 UT at ¶ 14 ("Thus, under [§ 26-19-7(1)(a)], ***a recipient must seek the State's consent*** before attempting to recover from a third party . . .") (emphasis added); *Houghton*, 2005 UT at ¶¶ 39-40 ("In *McCoy*, we concluded that the State was obligated to pay a proportionate share of the plaintiff's attorney fees because the plaintiff complied with section 26-19-7 . . . . ***We based this conclusion on the fact that McCoy had requested consent to pursue the State's claim.*** . . . Where Medicaid recipients failed to comply with the statute, they were not entitled to a contribution from the State for their attorney fees.") (emphasis added).

Indeed, the need for the Medicaid recipient to request consent before recovering any attorney fees from the State was directly at issue in *Streight*. In *Streight*, the issue before the court was whether the Medicaid recipient could recover some of his attorney fees from the State even though the recipient had not requested the State's consent prior to settling with the liable third party. *Streight*, 2004 UT at ¶ 1. The recipient argued that he was entitled to attorney fees because the Medicaid

statute did not explicitly provide that forfeiture of attorney fees was the consequence of not requesting the State's consent. *Id.* at ¶ 13.

The Utah Supreme Court rejected this argument, however, and after noting that the plain terms of the statute did not address any affirmative obligation on the State to pay attorney fees, and explained that

> In *McCoy*, on grounds of fairness, we interpreted the statute to imply an obligation on the part of the State to pay fees where the attorney acted in compliance with the statute, requesting consent to pursue an action and then preserving the State's independent right to recover by excluding the State's claim from any action filed on behalf of the injured party. In doing so, *McCoy* struck a balance between the State's interest in protecting itself from collusive efforts to place otherwise reimbursable funds beyond its reach and the interest of private attorneys in being compensated for obtaining recoveries benefitting the State. **This balance would be upset were we to extend *McCoy* to situations where a Medicaid recipient's private attorney does not bother to seek the State's consent to his or her action.** *Id.* at ¶ 13 (emphasis added).

In order to avoid upsetting the balance established by *McCoy*, the Utah Supreme Court in *Streight* declined "to extend the State's contingent obligation to pay attorney fees . . . to cases **where attorneys fail to seek the State's consent** to actions

seeking recovery of Medicaid recipients' medical costs." *Id.* at ¶ 16 (emphasis added).

In light of the Utah Supreme Court's clear holding that request for the State's consent is a prerequisite to recovering attorney fees, this Court declines to "relax" the statutory request requirement and recognize a "futility" exception. The statute plainly requires the recipient to seek consent from the State. If any Plaintiff chose to ignore the statutory requirements of § 26-19-7 because the Plaintiff felt the request would have been "futile," he did so at his own peril. Therefore, a Plaintiff must show that he or she requested consent from the State to recover attorney fees under *McCoy*.[6]

3. Satisfaction of Lien through Counsel's Efforts

The third element a Plaintiff must show in order to recover attorney fees is that the State satisfied its lien from proceeds procured through the Plaintiff's efforts. *See Houghton*, 2005 UT

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[6] The Plaintiffs also argue that the retainer agreements were unethical and therefore the Plaintiffs contend that refusing to sign these agreements should excuse the failure to obtain consent. However, the prerequisite to obtaining attorney fees is not **obtaining** consent, but simply **requesting** consent. If the recipient's attorney requested consent, but was unable to obtain consent because he refused to sign what he felt was an unethical agreement, the recipient is still entitled to attorney fees in that case because consent was requested.

at ¶ 49 ("Accordingly, in all cases where the State satisfies its lien from proceeds procured through the efforts of a private attorney, the State is responsible for its proportionate share of attorney fees . . ."). Neither the State nor the Plaintiffs dispute this element, but it should be noted that the Plaintiff's burden on this element is light. The Plaintiff need only show that it was represented by counsel at the time it obtained a recovery from the third party to meet its burden. If the represented Plaintiff can show he obtained a third party recovery, the presumption will be that the State satisfied its lien from proceeds procured through the Plaintiff's efforts. *See Houghton*, 2005 UT at ¶ 49 ("moreover, in those cases where a settlement or judgment is obtained through the efforts of a private attorney, any claim by the State that it recovered its lien through its own efforts will be subject to scrutiny."). As discussed further below, the State will then have the burden to show that it satisfied its lien through its own efforts and not the recipient's efforts.

4. Payment of Reasonable Attorney Fees

The fourth element a Plaintiff must show is that the State failed to pay the reasonable attorney fees the State owed the

Plaintiff for procuring the State's recovery. This element necessarily involves deciding how a reasonable fee is determined. The method of determining a reasonable fee is the primary dispute between the parties. The Plaintiffs contend that the State is required to pay the same percentage of attorney fees on its lien reimbursement that the recipient paid to his own attorney. The Plaintiffs seek a presumption that this is 33%.[7] The State counters that the determination of attorney fees is a fact intensive inquiry rather than a simple across the board 33%.

In order to resolve this dispute, it is important to examine the basis for allowing a recipient to recover attorney fees from the State. Examining § 26-19-7, there is clearly no express requirement for the State to pay attorney fees. *See Streight*, 2004 UT at ¶ 13 ("the plain terms of [§ 26-19-7] do not address

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[7] Despite Plaintiffs' contention, it is this Court's experience in reviewing minor settlements that the percentage for attorney fees in personal injury claims are often less than 33%. The Court has seen numerous cases where the percentage is 25% or some other percentage than 33%, including cases involving the law firms of the individuals who have filed affidavits stating that the standard contingency fee is 33%. Moreover, even when the agreed percentage is 33%, it often happens where the case will settle and the recipient will pay less than the 33% agreed amount. Therefore, Plaintiffs' contention that 33% is almost always the percentage paid by the recipient does not excuse proof of the actual percentage in each case as a factor in determining the reasonable fee.

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any affirmative obligation on the part of the State to pay attorney fees.") However, in *McCoy*, the Utah Supreme Court faced a circumstance where a Medicaid recipient had complied with the statute in every way, was denied consent by the State to represent it, and then had the State reimburse itself from the recipient attorney's third party recovery after the recipient had excluded the State's lien. 2000 UT at ¶¶ 2-6.

Confronted by such a circumstance, the Utah Supreme Court later explained that "[i]n *McCoy*, on grounds of fairness, we interpreted the statute to imply an obligation on the part of the State to pay fees where the attorney acted in compliance with the statute, requesting consent to pursue an action and then preserving the State's independent right to recover by excluding the State's claim from any action filed on behalf of the injured party."[8] *Streight*, 2004 UT at ¶ 13. Therefore, the obligation to pay attorney fees is not from any affirmative requirement in the

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[8] The Utah Supreme Court later clarified that excluding the State's lien was not a prerequisite to recovering attorney fees. *See Houghton*, 2005 UT at ¶ 48 ("We accordingly hold that the State's obligation to pay its share of attorney fees is not dependent upon whether the recipient expressly excluded the State's claim . . .").

statute, but from an implied obligation read into the statute by the *McCoy* court.

In its most recent pronouncement on the subject, the Utah Supreme Court declared that *McCoy*'s ruling requiring the State to pay attorney fees was based in equity.[9] *See Houghton*, 2005 UT at ¶ 43 (noting that barring recovery of attorney fees where the recipient did not exclude the State's claim would "defeat the equitable basis for our ruling in *McCoy*"). Therefore it is important to note that requiring the State to pay attorney fees where it denied consent should be viewed as an equitable interpretation of § 26-19-7 rather than as an express requirement of it.

In this light, the Court will examine what the Utah Supreme Court has stated regarding the State's obligation to pay attorney fees. In *McCoy*, the Utah Supreme Court never used the phrase "proportionate" to describe the State's share of attorney fees. Indeed, the Utah Supreme Court carefully divided § 26-19-7(4) and held that the "proportionate share" language in the statute

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[9] As used here, the term equity is not used in the sense of a law/equity dichotomy, but as a synonym for fairness.

referred only to costs, not attorney fees.[10] *McCoy*, 2000 UT at ¶ 16.

Instead, the *McCoy* court referred to the State's obligation to pay "reasonable" attorney fees. 2000 UT at ¶¶ 19-20. The court explained that under § 26-19-7, no matter what avenue the State chooses to recover its lien, the State is responsible for paying reasonable attorney fees. The court stated:

> The State may (1) take action directly against the third party, for which the State pays its own expenses; (2) grant consent to recipients seeking to pursue the State's claim, whereby the State's recovery will be reduced by **reasonable** attorney fees and, if any, its **proportionate** share of the costs of an action; or (3) refuse consent and proceed against the recipient after the recipient recovers from the third party, in which case the State's recovery shall be reduced by **reasonable** attorney fees. *McCoy*, 2000 UT at ¶ 19 (emphasis added).

Notably, under the second option, the *McCoy* court uses "reasonable" to refer to the attorney fees and "proportionate" to refer to the costs. This is consistent with the court's separation of the attorney fees section from the "proportionate" costs section under the statute. *Id.* at ¶ 16.

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[10] The Plaintiffs repeatedly attempt to connect the "proportionate costs" section of § 26-19-7(4) to the attorney fees section, but the Utah Supreme Court rejected this approach in *McCoy*. 2000 UT at ¶ 16.

Also notable is that whether the State grants consent under the second option or denies consent under the third option, in both cases, it is obligated to pay "reasonable" attorney fees. In other words, the State should pay fees that meet the standard of reasonableness of attorney fees regardless of whether it grants or denies consent. Based on this, the process to determine the State's attorney fees when it denies consent should be the same process that is used to determine the State's attorney fees when it grants consent.

The process for determining attorney fees when consent is given can be gleaned from § 26-19-7. Essentially, § 26-19-7(3)-(4) states that where the State gives consent, it must state the terms of the consent. However, the statute limits the discretion of the State in stating the terms of its consent by prohibiting the State from paying more than 33% of its recovery in attorney fees. There is nothing in § 26-19-7 that requires the State to pay the same percentage of attorney fees to the recipient as the recipient is paying to his attorney. Indeed, if the standard fee is 33⅓%, the statute prevents the state from paying the ⅓%. The statute instead presumes that once the recipient requests consent, the State will examine the circumstances of the Medicaid

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recipient's claim against the third party and determine a reasonable attorney fee that should be paid.[11]

In other words, the standard for determining reasonable fees is a totality of the circumstances standard. However, there are two factors that are of paramount importance in determining reasonable attorney's fees: (1) the fee arrangement between the recipient and his counsel; and (2) the case status at the time consent was requested.

The first important factor is the fee arrangement recipient's counsel agreed to accept to prosecute the claim against the third party tort-feasor. Where a lawyer and a client have agreed to a particular arrangement, that arrangement is strong evidence of what constitutes a reasonable attorney's fee in the case.

In the vast majority of cases, the fee arrangement will be a contingency fee agreement based upon the entire recovery, including the lien amount. In those cases, the agreed percentage

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[11] Of course, the determination by the State must be reasonable and made in good faith. Although the plain language of § 26-19-7(3) might support an argument that the State can require any terms it chooses, even unreasonable ones, *McCoy* is clear that the attorney fees must be "reasonable," even where the State is entitled under § 26-19-7(3) to state the terms of its consent. 2000 UT at ¶ 19.

is presumptively reasonable based on what was known about the case when the agreement was reached. In some cases, the fee arrangement may be a contingency percentage based upon the net recovery to the recipient, excluding the lien amount. Any such case would not be part of the proposed class, because the lawyer and not the recipient would be the proper party in interest. In some cases, the fee contract between the lawyer and the recipient may call for some other basis of computing the fee, such as an hourly rate or fixed fee. In these cases, the Court would have to examine the fee arrangement and determine the State's fair share based upon a totality of the circumstances.

The second factor is the case status at the time the recipient requests consent. If the recipient requests consent near the beginning of the case when the status is the same as when the fee percentage was set, the percentage of attorney fees owed by the State would likely be the same. However, if the recipient requests consent after investigations have been completed and the merits of the case are more clear, the State's attorney fees may be lower if in fact the risk of non recovery is

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less.[12] For example, as was often the case, if the recipient requested consent from the State after the recipient received an acceptable settlement offer from the third party, the State's attorney fees would be less because there was little risk of not recovering.[13]

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[12] Of course in some cases, investigation will show a higher risk of non recovery. However, because the attorney and the recipient presumably accounted for the risk that further investigation would show a higher risk of non recovery when they negotiated the percentage for attorney fees, the State will never be required to pay a higher percentage of attorney fees than the recipient paid. In other words, the percentage of attorney fees the recipient paid will act as a ceiling on the percentage of attorney fees the State must pay.

[13] This Court recognizes that where the recipient's attorney has done a substantial amount of work prior to requesting consent, the State arguably gets a free ride up to that point since the State's attorney fee will likely be lower under those circumstances. However, the State should not be punished where the recipient knows of his claim, but waits to inform the State. The clock on the State's obligation to pay fees should not begin to run until the State is put to the choice of deciding which of its collection options to choose. Section 26-19-7 clearly contemplates the recipient requesting consent from the State as soon as possible. To the extent the recipient chooses to wait to complete his statutory obligations, that choice should weigh on the recipient, not the State. This result is consistent with *Streight*'s holding that if the recipient does not seek the State's consent until after the claim has been settled or resolved, the State is not obligated to pay any attorney fees to the recipient, despite the apparent free ride to the State. *See Streight*, 2004 UT at ¶ 14 ("attorneys filing cases on behalf of Medicaid recipients may avoid the injustice of working to obtain a recovery without being paid simply by complying with the provisions of [§ 26-19-7]. . . "

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As a result, where the recipient makes his request in close proximity to when the recipient and his attorney entered into a fee agreement, a presumption will arise that the State's percentage of fees are the same percentage as the recipient's fees. However, it is likely that in most cases, there is a sufficient difference between the time the attorney is retained and the time the consent is requested that the presumption that the attorney fees are proportionate to the recipient's fees will not arise, thus requiring a more fact intensive inquiry.[14]

In light of this, this Court cannot accept Plaintiffs' contention that the attorney fees will always be the same percentage as the recipient's attorney fees. As the above discussion shows, to the degree that there is less risk of non recovery compared to when the recipient signed the retainer agreement, the State's attorney fee may correspondingly be less. Therefore, reasonable attorney fees under *McCoy* cannot simply mean whatever percentage of fees the recipient agreed to pay his attorney.

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[14] The resulting range in the percentage of attorney fees owed by the State will be somewhere between 20% to 33%. Notably, this is the same range of percentages that were employed where the State granted consent and entered into a fee agreement with the recipient.

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This rejection of Plaintiffs' argument accords with *McCoy* itself. The *McCoy* court concluded that "[w]e affirm the judgment of the trial court to the extent it held that the State is entitled to recover $8,846.92 from McCoy, but reverse to the extent the court failed to reduce the State's recovery by McCoy's reasonable attorney fees for procuring the State's share of the settlement proceeds." *McCoy*, 2000 UT at ¶ 20. As this statement reveals, the *McCoy* court knew the exact amount of the State lien at issue. If the *McCoy* court intended that the State's attorney fees should simply be 33%, it would have been easy to so indicate and even determine the precise amount the State owed in attorney fees.

Instead, the court remanded it to the district court for a determination of "reasonable" attorney fees. This Court knows of no case where "reasonable attorney fees" refers to a simple mathematical percentage. The court's remand action and use of the word "reasonable" suggests instead that the court had a more fact intensive inquiry in mind that had to be undertaken by the trial court.

Nothing in the Utah Supreme Court's later cases or in the Plaintiffs' memoranda convinces this Court otherwise. The

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Plaintiffs make much of the fact that the Utah Supreme Court later uses the term "proportionate" in *Houghton*. 2005 UT at ¶¶ 39, 49. However, there is nothing in the court's use of the term "proportionate" to suggest that they are rejecting its use of the term "reasonable" in *McCoy* or that they intend "proportionate" to mean the same attorney fees as paid by the recipient to his attorney. Indeed, the *Houghton* court also refers to the State's obligation to pay its "fair share" of attorney fees, which is more reminiscent of the "reasonable" language from *McCoy*. *Id.* at ¶ 40.

The Plaintiffs also spend a large amount of their brief contending that, under *McCoy* and *Houghton*, the State has no discretion in deciding whether to pay 33% in attorney fees. While the Plaintiffs are correct that the State has no discretion in whether to pay attorney fees, neither *McCoy* or *Houghton* held that the State must pay the same percentage of attorney fees as does the recipient. The State's attempt to bootstrap a 33% attorney fee requirement on to the Utah Supreme Court's holding that the State must pay reasonable attorney fees is an unsupported logical leap.

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Finally, the Plaintiffs focus a great deal on *McCoy*'s language that "the State must pay the attorney fees **incurred** in procuring the State's share of the settlement proceeds." 2000 UT at ¶ 18 (emphasis added). Admittedly, this language is seemingly more consistent with the Plaintiffs' approach than with the Court's approach. Ultimately, however, neither the Court's approach nor the Plaintiffs' approach is completely consistent with the various phrases used in *McCoy* and subsequent cases. Indeed, no approach is going to be completely consistent with the Utah Supreme Court's language because the language itself is not completely consistent.[15] This is likely because the Utah Supreme Court has never directly addressed how attorney fees under *McCoy* should be calculated. In light of this fact, it should not be surprising that the court has not used uniform language when referencing an award of attorney fees under *McCoy*.

Hence, although the Court's approach may not fit perfectly with all the Utah Supreme Court's language, it is still

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[15] This can clearly be seen by the fact that the State emphasizes the *McCoy* court's language of "reasonable" attorney fees while the Plaintiffs focus on the *Houghton* court's language of "proportionate" attorney fees. While "reasonable" and "proportionate" are not irreconcilable, they also cannot be said to be synonomous and there is an inherent tension between the two.

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preferable to the Plaintiffs' approach because the Plaintiffs' approach is not only inconsistent with the "reasonable" language, but it is also inconsistent with the theoretical framework of the *McCoy* decision and with the plain language of § 26-19-7. Given that the Utah Supreme Court has simply not yet explained how attorney fees should be calculated, this Court has adopted the approach that seems most consistent with § 26-19-7, with the circumstances of the *McCoy* holding, and with the Utah Supreme Court's direction on the subject. Therefore, for the above reasons, this Court finds that "reasonable attorney fees" under *McCoy* should be determined by examining the totality of the circumstances under which the recipient procured the State's recovery focusing on the percentage the recipient agreed to pay and when the recipient first requested consent.

Hence, to meet the fourth element in a *McCoy* cause of the action, the Plaintiff must show that the State did not pay the full amount of reasonable attorney fees it owed to the recipient using the above totality of the circumstances standard. If the Plaintiff meets his burden to show each of the above four elements, he will have made a prima facie case for recovery of attorney fees under *McCoy*.

B. Defenses by the State

If the Plaintiff successfully makes out a *prima facie* case for attorney fees by showing the above four elements, the burden will then shift to the State to show any applicable defenses. The Utah Supreme Court has identified two potential defenses that the State may use to avoid paying attorney fees: (1) the State can show that it satisfied its lien through its own efforts, or (2) the State can show it was prevented from collecting against the third party because of the Plaintiff's lack of cooperation. A successful showing of either of these defenses means the State is not liable for any attorney fees to the recipient.

1. State Procured its Own Lien

As discussed previously, if the Plaintiff procured a recovery from the third party, the presumption will be that the Plaintiff procured the State's recovery. In order to overcome this presumption, the State must show that it satisfied its lien through proceeds procured through its own efforts and not through the Plaintiff's efforts. However,

> [t]he State will not be able to establish that it recovered its lien through its own efforts simply by showing that it sent notification of its lien to potentially liable third parties with the expectation that they will pay the State directly from the settlement proceeds generated through the

> efforts of a recipient's private attorney. To avoid paying its fair share of attorney fees after it has refused to grant consent, the State must demonstrate that its lien was paid wholly independent of the settlement or judgment procured by the recipient's private attorney.

Houghton, 2005 at ¶ 49. However, where the State successfully shows that its lien was paid "wholly independent" of the Plaintiff's efforts, the State will not be liable for any attorney fees.

2. Lack of Cooperation

The second potential defense is where the State can show the recipient's lack of cooperation prevented the State from recovering. In *McCoy*, the State of Utah had argued that the Medicaid recipient was not entitled to attorney fees because he had failed to cooperate with the State. 2000 UT at ¶18 n.4. Although the Utah Supreme Court acknowledged that "a recipient has a duty to cooperate with the State in identifying and providing information to assist the State in pursuing" liable third parties, the court found that in McCoy's case, the lack of cooperation did not prejudice the State's claim against the third party. *Id.* Therefore, the court concluded that it did not need to address "whether the legislature intended not to award

attorney fees to a recipient whose 'failure to cooperate' prevents the State from recovering from a third party." *Id.*

Although the Utah Supreme Court did not determine whether a recipient's failure to cooperate could provide a defense to the State, this Court believes that such a defense should be available. Where the recipient's lack of cooperation prevents the State from having the opportunity to pursue its lien against the third party, the Medicaid statute has been frustrated.

In *Streight*, the court found that not requiring the recipient to request consent would prejudice the State because the State would "[lose] its ability to choose the most efficient vehicle for its recovery." 2004 UT at ¶ 12. Just as failure to request consent from the State robs the State of its ability to choose its avenue of recovery, a recipient's lack of cooperation can produce the same result. If the lack of cooperation hinders the State from pursuing its own recovery, then its option of pursuing its own recovery has been taken away. Therefore, if the State can show that a Plaintiff's lack of cooperation prevented it from pursuing its own recovery, the State will not be liable for any attorney fees to the Plaintiff.

III. Application of Rule 23

Now that the elements of a *McCoy* cause of action have been reviewed, the Court can now determine whether this matter should continue as a class action or instead should be decertified. The current class includes all those Medicaid recipients who were represented by counsel, who recovered against liable third parties, and who had the State satisfy its lien from the recipient's third party proceeds. The question now is whether to certify a smaller class in light of *McCoy* or whether to simply decertify the entire class. The answer depends on whether a smaller class based on *McCoy* would satisfy the Rule 23 class certification requirements. If the new class would not satisfy Rule 23, then no new classes should be certified and the current class should be decertified.

As an initial matter, Courts uniformly hold that a class action may be decertified if it no longer meets the criteria for class action. *See, e.g. Miera v. First Security Bank of Utah, N.A.*, 925 F.2d 1237, 1242 (10th Cir. 1991) (noting that Rule 23(c)(1) allows for decertification any time before a decision on the merits).

Moreover, whether to certify or decertify a class is within the sound discretion of the trial court. *See Richardson v. Ariz. Fuels Corp.*, 614 P.2d 636, 639 (Utah 1980) ("If the criteria of Rule 23 are complied with, it is within the sound discretion of the district court to determine whether a suit, or some of the issues in a lawsuit, should proceed as a class action."); *Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986) ("We will reverse a trial court's decision on class action status only when it is shown that the trial court misapplied the law or abused its discretion"); *Miera*, 925 F.2d at 1242 ("The abuse of discretion standard applies not only to an initial determination to certify a class, but also to a subsequent determination to decertify.").

Rule 23(a) of the *Utah Rules of Civil Procedure* lays out the requirements for continued class certification. It states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Of these four requirements, only the first two are disputed between the parties. Therefore, the Court will assume that

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requirements three and four regarding typicality of claims and adequacy of representation have been met.

In addition to Rule 23(a), in order to maintain class status, the Plaintiffs must also qualify under Rule 23(b)(1), (b)(2), or (b)(3). Both the Plaintiffs and the State agree that if the class is to continue, it must be under Rule 23(b)(3), which requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . .". The Court will now determine whether the relevant requirements for continued class certification have been met.

A. Numerosity

In order to maintain class certification under Rule 23(a)(1), the class must be so numerous that joinder of all members would be impractical. There is no set number that meets the numerosity requirement. *See Gen. Tel. Co. of the N.W., Inc. v. EOEC*, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.") While most jurisdictions resist having a set number, many jurisdictions nevertheless hold that fewer than 20 is inadequate and more than 40 is adequate.

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See, e.g. Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) ("while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.") (quotations omitted). In Utah, the general rule is that the "size of the class is not solely determinative of impracticability." *Call*, 727 P.2d at 183.

It is still unclear in this case what the size of the class would be. According to the State's review of 411 cases, only 28 cases would qualify as members of the class.[16] However, not all potential cases have been viewed and therefore, even if the State is correct about the 28 cases, there will likely be other cases discovered.

In any case, it is clear that even in the State's estimation, there are not so few cases that numerosity is clearly not met. On the other hand, it is also clear that there are not so many cases that size alone would determine that numerosity is satisfied. Instead, it appears that the numerosity will not be

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[16] Of course, the State did not have the benefit of knowing the Court's approach in determining attorney fees when it reviewed the cases. The State's approach was likely more stringent than the Court's approach and so there are probably more than 28 cases that would qualify.

determined by the size of the class alone, but on other factors in addition to size. These factors will be dealt with in deciding whether common questions predominate over individual issues. Therefore, because numerosity will turn not on the size of the class, but on other factors, the Court will assume for now that the numerosity requirement has been met.

B. Common Questions of Law or Fact

The second requirement for continued class action is that there must be questions of law or fact common to the class. Although the rule refers to "questions" in the plural, most courts find that only one question is required. *See, e.g. Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 663 (N.D. Ill. 1996) (commonality requirement is satisfied if plaintiffs demonstrate that there is at least one common question of law or fact). Because of this, most courts find that the commonality requirement is easily satisfied. *See Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (commonality requirement is not demanding because requirement may be satisfied by a single common issue).

In any case, because the Plaintiffs in this case must show that the common questions of law or fact predominate over

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individual issues, then the commonality requirement will necessarily be decided in the predominate section below. If the Plaintiffs meet the predominate requirement, they will also meet the commonality requirement. On the other hand, if the Plaintiffs do not meet the predominate requirement, then the class should be decertified regardless of whether they meet the commonality requirement.

C. The Predominance Requirement

The final and most heavily disputed requirement for continued class certification is that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . ." UTAH R. CIV. P. 23(b)(3). In order for class certification to continue, the Plaintiffs must show that the common questions of the class predominate over any individual questions.

The common questions in this matter are the legal questions that define the *McCoy* cause of action. With the exception of how to determine the amount of reasonable attorney fees the State must pay, all the relevant legal questions have been resolved by the Utah Supreme Court in other cases. Therefore, how attorney fees should be determined is essentially the only common question

that remains among the class. In order to determine whether the common question of how to calculate attorney fees predominates, the Court must next identify the individual questions that are not common to the class.

The first issue over which there are individual determinations to be made is the issue of whether the recipient was represented by counsel. In the vast majority of cases, this will be a simple determination. There are, however, at least a few cases where a recipient was initially represented by counsel, but where the counsel had withdrawn prior to the time settlement was reached. Whether these cases are addressed under the element of representation by counsel or under the element of whether the settlement was procured as a result of the attorney's efforts, some case specific evidence would need to be considered in these cases to determine whether an attorney's fee is owed.

The second issue represents individual questions as to whether consent was requested. Based upon the Affidavits that have been submitted to the Court analyzing the claims files, the parties have come up with grossly disparate estimates of the number of cases in which consent was requested. It appears, therefore, that for at least some cases, the Court will have to

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consider evidence and make a factual determination about whether consent was requested.

The third and most important individual question relates to the determination of attorney fees.[17] In examining this issue, it will be helpful to divide the class into two different groups. The first group contains those claims where the State never paid any attorney fees or discounted its lien, usually because the State denied consent. The second group contains those claims where the State granted consent and accordingly paid some attorney fees or discounted its lien.[18] These two groups are

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[17] In order to avoid confusion, it should be noted that while the question of **what** process should be used to determine the amount of attorney fees is a question common to the class, the **application** of that process involves individual questions. For example, the Plaintiffs' answer to the question of what process should be used is that the State should pay the same percentage of attorney fees as the recipient pays to his attorney, with a presumption that this percentage is 33%. This answer is applicable to all members of the class. However, the question of what particular percentage an individual recipient paid his attorney is an individual inquiry not common to the class.

[18] The critical component of this second group is not whether the State granted consent, but whether the State paid any attorney fees or discounted its lien. If the State denied consent, but nevertheless discounted its lien or paid some attorney fees, this circumstance would fall within the second group. Conversely, a circumstance where the State granted consent, but never paid any fees or discounted its lien would fall within the first group. Therefore, although whether consent was given or denied does not determine what group a Plaintiff is

important because the Plaintiffs fitting within the second group face additional individual inquiries in addition to those found in the first group. Each of these groups will be discussed in turn.

1. Cases where Consent was Denied or No Attorney Fees were Paid.

The first group involves those Plaintiffs who received no attorney fees or discount from the State. The individual questions involving these Plaintiffs are primarily questions as to the amount of reasonable attorney fees. Although the Plaintiffs' and the State's dispute has taken place in the context of whether the common questions predominate, the crux of their dispute has really been over how reasonable attorney fees should be calculated. Both parties' memoranda implicitly recognize that the predomination issue hinges on who is right on the attorney fees issue. If the Plaintiffs are correct that attorney fees are simply 33% of the lien recovered, then the common question of how to calculate attorney fees may predominate. On the other hand, if the State is correct that the

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in, the discussion assumes that normally when the State consented, it paid attorney fees or discounted its lien and when the State denied consent, it did neither.

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determination of attorney fees is more than a simple mathematical formulation, then the common question of how to calculate attorney fees does not predominate.

As already discussed, this Court has rejected the Plaintiffs' contention that the State's attorney fees are presumptively 33% of the lien recovery. Instead, this Court has determined that the State's attorney fees are determined by examining the totality of the circumstances under which the recipient recovered the State's lien with a special emphasis on the fee arrangement the recipient attorney agreed to accept, and the circumstances and risks involved at the time the recipient requested consent from the State.

The individual questions involved with this comprehensive inquiry will be as varied as the individual recipient's circumstances. The first of the individual questions that will need to be answered is the amount the recipient agreed to pay his own attorney. In those cases, where the fee was based upon an hourly, flat fee or some other non-percentage fee arrangement, the Court will have to examine the circumstances of each individual case to determine the State's fair share. Even where the fee arrangement is based upon a fixed percentage, the Court

will need to determine that percentage for each individual case. As discussed previously, this information is important because the recipient's percentage of attorney fees will act as a ceiling on the amount of attorney fees the State must pay. While the State may often pay a smaller percentage than the recipient paid his attorney, the State can never be required to pay a higher percentage than the recipient paid his attorney. Of course, even if the Court adopted the approach that a "proportionate" (as defined by Plaintiffs) fee must be paid in all cases, the Court would still have to determine what percent each claimant paid to his own counsel.[19] This individual issue alone would predominate over any common issue.

The fact finder will then need to examine the circumstances of the case at the time the recipient requested consent and determine the risks involved in pursuing the claim. In making this examination, the fact finder would look at the same considerations the recipient's attorney considers when

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[19] Even if the Court used this approach, however, it would still reject a presumption of 33% in every case. As mentioned previously, the 33% contingent fee is not so prevalent that a presumption of 33% should be given. Therefore, the Plaintiff would have the burden to establish what percentage he had paid his attorney.

determining the percentage of attorney fees he will charge in a contingency fee case. The fact finder will then need to examine how the pursuit of the recipient's claim progressed and how much effort went in to procuring the State's recovery. Based on these examinations, the fact finder will then determine the reasonable percentage of attorney fees the State owes the recipient within the range of 20% to 33%.

In addition to this individual question, however, there are numerous other individual questions that would be involved.[20] Because of the myriad individual questions that will necessarily take place as part of this examination, there is little question that the individual questions involved in this fact-intensive inquiry would predominate over the common question in this case.

The Plaintiffs make much of the fact that the individual inquiries involved in this case are primarily inquiries that can

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[20] While the Court will not attempt to make an exhaustive list of such individual inquiries, a few of the potential individual questions that will be involved are: (1) when the request for consent was made, (2) how much investigation has been done on the case prior to the request, (3) the likelihood of settlement without a trial, (4) whether liability or causation was aggressively contested, (5) the complexity of the case, (6) whether the case went to trial or settled prior to trial, (7) the experience, reputation and ability of the lawyer performing the services, and (8) the amount of the Medicaid lien.

be categorized as "damage" inquiries. However, the mere fact that individual inquiries relate to damages does not mean that the inquiries cannot be considered in determining whether common questions predominate. *See Bell Atlantic Corp. v. Rochelle Communications, Inc.*, 339 F.3d 294, 307 (5th Cir. 2003) ("'where the plaintiffs' damage claims focus almost entirely on facts and issues specific to individuals rather than the class as a whole, the potential . . . that the class action may degenerate in practice into multiple lawsuits separately tried, renders class treatment inappropriate.'") (quoting *O'Sullivan v. Countrywide Home Loans*, 319 F.3d 732, 744 (5th Cir. 2003)). This is especially true where, as here, the liability and damage phases are closely intertwined.

The better reasoned view is that the court should examine the entire litigation, including the damages phase, in making the determination of whether common questions predominate. *See Windham v. Am. Brands Inc.*, 565 F.2d 59, 71 (4th Cir. 1977) ("a trial judge cannot, in determining the manageability of a proposed class action, look exclusively to only one aspect of the case . . . ; he can and must look at the case as a whole and . . consider proof of damages as well as other issues in the

case."). This is not a case where the damages can be calculated using a mathematical formula. Rather this is a case where calculating damages would involve numerous individual mini-trials that would defeat the desired efficiency of having a class action case. *See Windham*, 565 F.2d at 68 ("where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires separate mini-trials of an overwhelming large number of individual claims, courts have found that the staggering problems of logistics thus created make the damage aspect predominate and render the class action unmanageable as a class action.") (quotations omitted).

Although the Plaintiffs are correct that the *Call* case is not directly on point, its conclusion is applicable: "Judicial economy would be little served because the amount of the claim for each class member would still need to be determined on an individual basis, regardless of class action status." 727 P.2d at 183-84. The only claim left in this case is for attorney fees and the determination of those attorney fees are an individual fact intensive inquiry that makes certifying a class of Plaintiffs in the first group inappropriate.

2. Cases Where the State Paid Attorney Fees or Discounted its Lien

As previously mentioned, the second group includes those claims where the State granted consent to the Plaintiff and accordingly paid some attorney fees or discounted its lien. The reasons for not certifying a class of Plaintiffs fitting the first group also warrant not certifying a class of Plaintiffs fitting the second group because, in both groups, the amount of attorney fees owed by the State would need to be determined using a fact intensive inquiry. However, independent of those reasons, there are two additional problems with certifying a class of Plaintiffs fitting in the second group.

The first problem with certifying a class of Plaintiffs in the second group is that in many cases, if not most, the Plaintiff's attorney entered into a retainer agreement with the State whereby the State and the recipient expressly agreed to the amount of attorney fees the State would pay. In entering into these retainer agreements, § 26-19-7(3) and (4) gives the State broad discretion to establish the amount of attorney fees. Section 26-19-7(3) states that "[t]he department's written consent, if given, shall state under what terms the interests of the department may be represented in an action commenced by the

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recipient." Section 26-19-7(4) then places a limit on the State expressly prohibiting the State from paying "more than 33% of its total recovery for attorney's fees." The statute does not provide a lower limit on what the State can pay.

Therefore, by the statute's plain language, the State has broad discretion to state the terms of its consent, including the amount of attorney fees, as long as it does not pay more than 33%. The presumption, then, is that where the State has granted consent and stated the terms of the representation in good faith, the recipient and his attorney are bound by that agreement if they accept it. Where a recipient and the State have already agreed to the amount of attorney fees, it is not this Court's place to change the terms of that agreement.[21]

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[21] The Plaintiffs spend a brief portion of its memoranda contending that these retainer agreements are unethical and unenforceable. However, this Court declines to address the serious and substantive contention that the State's agreements are unethical and unenforceable when the matter has been only briefly and collaterally argued. Such an argument should be the subject of a separate motion where the matter can be fully briefed and considered. Moreover, such a motion could not be heard unless the original parties to the retainer agreement were included in the case. The Court cannot rule on whether an agreement is unethical and unenforceable when the recipient's attorney who entered into the agreement is not present in the case. However, even if the needed parties were included in the case and the Plaintiffs are correct that the retainer agreements are unenforceable, then a court would still need to determine

However, aside from any agreements that occurred between the State and the recipient, there is a second and more serious problem with certifying a class of Plaintiffs where the State consented. In every case where the State paid an attorney fee or discounted its lien, there will be issues involving estoppel, waiver, or accord. By accepting the State's attorney fee or discount, a question necessarily arises whether the recipient waived or is estopped from asserting a right to additional attorney fees. This is true whether or not there was any type of substantive negotiation between the State and the recipient's attorney.

The problem with certifying a class of Plaintiffs where the Plaintiffs accepted a discount or money from the State is that estoppel, waiver, and accord are all fact intensive inquiries. *See State of Utah v. Irizarry*, 945 P.2d 676,678 (Utah 1997) (noting the "variety of fact-intensive circumstances" under which estoppel can apply); *IHC Health Servs., Inc. v. D & K Mgmt.*,

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what attorney fees should be awarded. As a practical matter, the cases that involved an unenforceable agreement would be treated the same way as the cases where the State never granted consent. The Court's conclusion that class status is unwarranted in cases where the State denied consent would be equally applicable to cases where the agreement was held to be unenforceable.

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Inc., 2003 UT 5 ¶ 7,73 P.3d 320 ("Waiver is an intensely fact dependent question, requiring a trial court to determine whether a party has intentionally relinquished a known right, benefit, or advantage."); *Neiderhauser Builders and Dev. Corp. v. Campbell*, 824 P.2d 1193, 1198 (Utah Ct. App. 1992) (reversing trial court because there was a question of fact regarding accord and satisfaction). Because of the fact intensive inquiries regarding these legal doctrines that must necessarily occur in cases where the State gave a discount or paid an amount of attorney fees to the recipient, these cases are not appropriate for class action status.

Moreover, unlike the Plaintiffs in the first group, the Plaintiffs in the second group not only have individual questions as to damages, but also additional questions as to liability. Whether an individual Plaintiff has waived his right to attorney fees by accepting fees or a discount from the State is a question of liability, not of damages. Class actions are clearly more inappropriate when there are not only individual questions regarding damages, but also individual questions regarding liability. Therefore, class status is even more inappropriate

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for Plaintiffs in the second group than it is for the Plaintiffs in the first group.

As should be clear from the Court's discussion, the individual questions involved in determining the reasonable attorney fees the State owes would by themselves predominate over any common questions. Therefore, based on these individual questions alone, the class should be decertified. However, it should also be noted that there are additional individual questions that would potentially arise that further makes continued class status inappropriate.

Two additional individual questions are the State's two defenses discussed previously. The State's first potential defense that was discussed was where the State satisfied its lien wholly through its own efforts and not those of the recipient's efforts. Determining whether the lien was procured through the State's efforts or the recipient's efforts will be a fact intensive inquiry that requires examining the State's specific actions in each case where the defense is raised. This defense will not be a common question among the class members because

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there will clearly be cases where the State took little or no efforts to recover its lien.[22]

The State's second potential defense that was discussed is where the recipient's lack of cooperation prevented the State from collecting its lien from the third party. As with the State's first defense, determining whether the recipient's lack of cooperation prevented the State from recovering its lien will also be a fact intensive inquiry. Therefore, where the defense is raised, it will constitute an individual question not common among the class.[23]

Aside from the individual questions already discussed, it should also be noted that the Plaintiffs' "futility" exception would present another individual question that would make class

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[22] Admittedly, the Court does not know how much of an issue this will be. It may well be that in the vast majority of cases, the State's recovery was clearly through the efforts of the recipient and therefore the State will not attempt to use this defense. Because it is unknown in how many cases this defense will be raised, the Court is not placing great weight on this defense as an individual question.

[23] As with the State's first defense, this defense may also not be much of an issue and there may be very few cases where the State contends that the recipient's failure to cooperate prevented the State from recovering its own lien. For this reason, the Court is placing very little weight on this defense as well in determining whether common questions predominate.

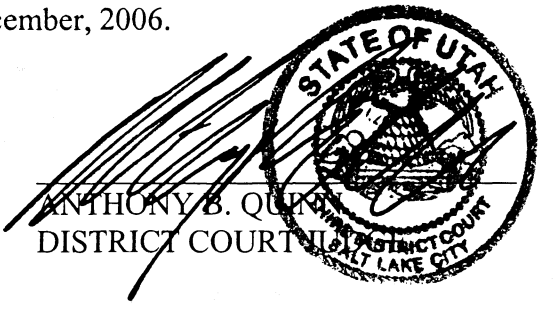
action status unwarranted. As previously discussed, the Plaintiffs contend that even where the recipient did not request consent from the State, the Court should allow the recovery of attorney fees where it would have been futile to ask the State for consent due to purported State policy of denying consent for certain categories of cases. Although the Court has rejected Plaintiffs' request to relax the request for consent requirement, if a futility exception applied, it would present an individual question based on whether the individual Plaintiff was aware of a State policy that made a request for consent futile. If the Plaintiff was not aware that the request would be futile, then the basis for recognizing the exception would not be present. Therefore, were the Plaintiffs correct that there should be a futility exception, the exception would provide another individual question that would further support the Court's reasons for decertifying the class.

As can be seen from the Court's above discussion, revising and certifying a new class of Plaintiffs is unwarranted because there is no potential class that would satisfy the requirements of Rule 23. The common question among the class members would not predominate over the individual questions that exist. Hence,

rather than revise or certify a new class, the current class should be decertified. Therefore, for the above reasons, the State's motion to decertify is hereby GRANTED.

The Court's decision to decertify the class potentially impacts at least some of the various pending motions from the parties. In light of this potential impact, the Court directs each party to simultaneously submit supplemental briefs by January 12, 2007 addressing any impact of today's ruling on the various outstanding motions. Once the parties have filed the supplemental briefs, this Court will schedule a hearing to hear arguments on all remaining outstanding motions.

DATED this 22nd day of December, 2006.



ANTHONY B. QUINN
DISTRICT COURT JUDGE

11717

Tab 2

LAW OFFICES
ROBERT B. SYKES & ASSOCIATES
A PROFESSIONAL CORPORATION
311 SOUTH STATE STREET, SUITE 240
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ROBERT B. SYKES
ALYSON E. CARTER

Practice Concentrates in Personal Injury Law
Emphasis on Brain and Spinal Cord Injury Cases
Civil Rights Litigation

Of Counsel:
ROBERT J. FULLER

January 9, 2007

~ Via Telefax & U.S. Mail ~

Judge Anthony B. Quinn
Third Judicial District Court
450 South State Street
Salt Lake City, Utah 84114

Re: *Houghton, et al. v. State of Utah,* Civil No. 950907491CV
Order of December 22, 2006

Dear Judge Quinn:

I am in receipt of your December 22, 2006, 54-page Order ruling on the decertification motion. The last paragraph indicates the following:

> In light of this potential impact, the Court directs each party to simultaneously submit ***supplemental briefs by January 12, 2007*** addressing any impact of today's ruling on the various outstanding motions. Once the parties have filed the supplemental briefs, this Court will schedule a hearing to hear arguments on all remaining outstanding motions.

12/22/06 Order, p. 54 (emphasis added). I assume that the intent of that language is to allow you to rule on other pending motions so that a future appeal will address all possible issues. If that is the intent, I think that is a good thing. The only problem is that asking for Briefs by January 12th contemplates hearing these matters at a future hearing, when the time for appealing the decertification motion will have undoubtedly passed.

I would have to interpret an order granting decertification as a "final order," which means that my time to appeal would end on January 21, 2007 (if I am counting the days correctly). I doubt very much that we could brief and hear further matters on or before that date. Further, if I file a Notice of Appeal there is a question in my mind as to whether or not it would divest you of any jurisdiction to hear these other matters.

One solution to this problem may be to amend your 12/22/06 Order and make it clear that this Order is not a final Order until such time as you have ruled on these other matters. Perhaps also I could file a Notice of Appeal with a stipulation of counsel and agreement by the Court that the

Notice could later be amended to include the other matters. It is an unusual situation and I am not quite sure exactly how to proceed, but I do need to protect the right to appeal, as you can well imagine.

I would appreciate hearing from you shortly on this matter.

Very truly yours,

Robert B. Sykes

RBS:jac
cc: Phillip S. Lott, Esq. *(via fax & mail)*

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Tab 3

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

PAUL HOUGHTON, Plaintiff,	:	MINUTE ENTRY
vs.	:	Case No: 950907491
DEPARTMENT OF HEALTH, Defendant.	:	Judge: ANTHONY B. QUINN Date: January 12, 2007

This Minute Entry will clarify that the Court's Order of December 22, 2006 is not intended as a final order. Additional Motions will be heard on January 23, 2007 that may result in modification of the Order. Until the Order is signed following the January 23rd hearing, the December 22nd Order should be considered provisional.

Judge ANTHONY B. QUINN

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Tab 4

JAN 26 2007

FILED DISTRICT COURT
Third Judicial District
FEB 15 2007
SALT LAKE COUNTY
By
Deputy Clerk

PHILIP S. LOTT (5750)
STEVEN A. COMBE (5456)
Assistant Utah Attorneys General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorney for Defendants
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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH

PAUL HOUGHTON, *et al.*, Plaintiffs, vs. DEPARTMENT OF HEALTH, *et al.*, Defendants.	**ORDER DENYING PLAINTIFFS' MOTIONS:** **1) FOR ASSESSMENT OF INTEREST ON DAMAGES,** **2) FOR AWARD OF ATTORNEY FEES,** **3) TO DETERMINE THAT PLAINTIFFS' CLAIMS DO NOT CONSTITUTE AN "INJURY" UNDER THE GOVERNMENTAL IMMUNITY ACT AND ARE EQUITABLE IN NATURE, AND** **4) FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE.** Civil No. 950907491 Judge Anthony B. Quinn

THIS MATTER having come before the Court for hearing on January 23, 2006, of Plaintiffs' Motions: 1) For Assessment of Interest on Damages, 2) For Award of Attorney Fees, 3) To Determine That Plaintiffs' Claims Do Not Constitute An "Injury" Under the Governmental Immunity Act, and 4) For Sanctions Due to Spoliation of Evidence; Plaintiffs appearing by and through their counsel, Robert B. Sykes, and Defendants appearing by and through their counsel, Philip S. Lott; the Court

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having reviewed the pleadings, received oral arguments from counsel, and being otherwise fully advised, FINDS:

Impact of December 22, 2006 Order

1. The Court's December 22, 2006 Order on Motion for Decertification necessarily impacts Plaintiffs' remaining motions as addressed herein.

2. Because the individually named Plaintiffs are free to proceed on their individual claims, the December 22, 2006 Order does not terminate the entire litigation.

Plaintiffs' Motion for Assessment of Interest on Damages

3. In the December 22, 2006 Order, the Court rejected Plaintiffs' contention that the State's attorney fees are presumptively 33% and, instead, held that any attorney fees due will have to be determined on an individual, case by case basis.

4. Because the amount of any attorney fees due will have to be determined on a case by case basis and will not be a liquidated amount, Plaintiffs' cannot be awarded prejudgment interest and their motion should be denied.

Plaintiffs' Motion for Award of Attorney Fees

5. The individually named Plaintiffs' claims for attorney fees are mooted by the December 22, 2006 Order which prevents this lawsuit from proceeding as a class action.

6. The individually named Plaintiffs' claims are for personal, individual awards of money.

7. The cost of pursuing the individually named Plaintiffs' personal pecuniary interests does not require subsidization by allowing a separate recovery for attorney fees incurred in prosecuting their claims.

8. The general rule in Utah, that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award, should be followed in this case and the motion for attorney fees should be denied.

Plaintiffs' Motions to Determine That Plaintiffs' Claims Do Not Constitute an "Injury" under the Governmental Immunity Act and Are Equitable in Nature

9. These motions are directed at determining whether the applicable statute of limitations extends beyond the limitations period allowed by the Utah Governmental Immunity Act.

10. Because there is no evidence that the claims of the individually named Plaintiffs arose before the statute of limitations under the Utah Governmental Immunity Act, these motions are moot and should be denied.

Plaintiffs' Motion for Sanctions Due to Spoliation of Evidence

11. Because at this time there is no evidence of spoliation of evidence that would affect the claims of the individually named Plaintiffs, this motion should be denied without prejudice.

The December 22, 2006 Order on Motion for Decertification Is Now a Final Order

12. The Court's January 12, 2007 Minute Entry provided that the December 22, 2006 Order was not intended to be a final order until after consideration of the additional motions addressed herein.

13. There will be no modifications to the December 22, 2006 Order on Motion for Decertification.

14. With the signing of this Order, the December 22, 2006 Order is now a final order.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED:

1. Plaintiffs' Motions: 1) For Assessment of Interest on Damages, 2) For Award of Attorney

Fees, and 3) To Determine That Plaintiffs' Claims Do Not Constitute An "Injury" Under the Governmental Immunity Act are denied.

2. Plaintiffs' Motion for Sanctions Due to Spoliation of Evidence is denied without prejudice.

3. The December 22, 2006 Order on Motion for Decertification is now a final order.

DATED this 15th day of February, 2007.

BY THE COURT:

Anthony B. Quinn
District Court Judge

Approved as to form:

2-5-07
Robert B. Sykes

2/7/07
Philip S. Lott

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing proposed **Order Denying Plaintiffs' Motions: 1) For Assessment of Interest on Damages, 2) For Award of Attorney Fees, 3) To Determine That Plaintiffs' Claims Do Not Constitute An "Injury" Under the Governmental Immunity Act, and 4) For Sanctions Due to Spoliation of Evidence** was mailed, postage pre-paid, this 26th day of January, 2007, to the following:

Robert B. Sykes
Alyson E. Carter
ROBERT B. SYKES & ASSOCIATES
311 South State Street, #240
Salt Lake City, UT 84111
Attorneys for Plaintiff

By_____

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Tab 5

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone (801) 578-3900
Fax (801) 578-3999
Supreme Court Reception 238-7967

Marilyn M. Branch
Appellate Court Administrator

Pat M. Bartholomew
Clerk

Christine M. Durham
Chief Justice

Michael J. Wilkins
Associate Chief Justice

Matthew B. Durrant
Justice

Jill N. Parrish
Justice

Ronald E. Nehring
Justice

May 30, 2007

ROBERT B. SYKES
ROBERT B. SYKES & ASSOCIATES
311 S STATE ST STE 240
SALT LAKE CITY UT 84111-2320

Re: Houghton v. DOH

Utah Supreme Court No. 20070197
District Court No. 950907491

Dear Mr. SYKES:

Enclosed is a copy of the order granting the interlocutory appeal entered by the Utah Supreme Court on May 29, 2007, in the above referenced case.

This order takes the place of a notice of appeal. A docketing statement is not required. However, in accordance with Rule 11, of the Utah Rules of Appellate Procedure you must make arrangements for any necessary transcripts or inform us that no transcripts are required. If transcripts are requested, payment arrangements must be made. See Utah Rules of Appellate Procedure 11. This should be done timely. Once this process is complete, the district court will be notified that the record index should be prepared and sent to the Utah Supreme Court. The briefing schedule will be set upon receipt of the record index on appeal.

If you have any questions, please contact me at 578-3900.

Sincerely,

Celia Urcino
Deputy Clerk

Enc.
cc: THIRD DISTRICT, SALT LAKE
DEBRA J. MOORE
PHILIP S. LOTT
PEGGY E STONE

4316

IN THE UTAH SUPREME COURT

---oo0oo---

Paul Houghton, Billie Henderson, individually and each as representative of a class, Damian Henderson, Wayne Rubens, Ron Roes and Susan Roes, who are other members of these classes, similarly situated,

Petitioners,

v.

Case No. 20070197-SC
950907491

Department of Health, The Office of Recovery Services, The Department of Human Services and The State of Utah (the "State Defendants") and Rod L. Betit, Director of the Department of Health and Director of Department of Human Services; Emma Chacone, Executive Director of the Office of Recovery Services; John Does 1-50 and Jane Does 1-50 (the "individual defendants"),

Respondents.

ORDER

This matter is before the court upon a Petition for Permission to Appeal an Interlocutory Order, filed on March 7, 2007. A response to the petition was filed on April 12, 2007.

IT IS HEREBY ORDERED pursuant to rule 5 of the Rules of Appellate Procedure, the petition for permission to appeal the interlocutory order is provisionally granted. Review will be limited to the following questions, which the parties are requested to brief.

1. Whether this Court has jurisdiction, pursuant to rule 5 of the Rules of Appellate Procedure, to review the December 22, 2006 "order on motion for decertification", in light of the district court's subsequent minute entry, dated January

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

ROBERT B SYKES
ROBERT B SYKES & ASSOCIATES
311 S STATE ST STE 240
SALT LAKE CITY UT 84111-2320

DEBRA J. MOORE
PHILIP S. LOTT
PEGGY E STONE
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FLR
PO BOX 140856
SALT LAKE CITY UT 84114-0856

THIRD DISTRICT, SALT LAKE
ATTN: JODI BAILEY / MARINA DAVIS
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this May 30, 2007.

By Celia Urrutia
Deputy Clerk

Case No. 20070197
THIRD DISTRICT, SALT LAKE, 950907491

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